TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 158. 20

THE SOUTHERN PACIFIC RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

ISAAC T. BELL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED NOVEMBER 22, 1900.

(17,570.)



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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JUNE 20, 1900.



1 *Writ of Error.*

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the supreme court of the State of California, Greeting:

Because of the record and proceedings and also in the rendition of the judgment of a plea which is in the said supreme court (being the highest court of the State of California in which a decision in the hereinafter-mentioned suit could be had), before you, between The Southern Pacific Railroad Company, plaintiff, and Isaac T. Bell, defendant, wherein was drawn in question, necessarily involved, and passed upon the validity of a statute of and authority exercised under the United States and a title, right, privilege, and immunity specially claimed by the said plaintiff under a statute of and authority exercised under the United States, and wherein it was decided against the title, right, privilege, and immunity claimed by the said plaintiff, manifest error has happened, to the great damage of the said Southern Pacific Railroad Company, as by its complaint appears, we, being willing that error, if any has been done, shall be duly corrected and full and speedy justice be done to the parties aforesaid in this behalf, do command you, if judgment should be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all the things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, in the
2 District of Columbia, on or before December 6th, 1899, in the said Supreme Court to be then and there held, to the end that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, on this October 7th, 1899.

[Seal U. S. Circuit Court, Northern Dist. Cal.]

SOUTHARD HOFFMAN,
Clerk U. S. Circuit Court, Northern District of California.

The foregoing writ of error is hereby allowed, on this October 17th, 1899.

W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

I hereby certify that the foregoing writ of error, with a copy thereof for the defendant, was lodged in the office of the clerk of

the said supreme court of the State of California on October 17th, 1899.

Dated and signed on October 20th, 1899.

[Seal Supreme Court of California.]

GEO. W. ROOT,
Clerk of the Supreme Court of the State of California,
By A. W. JOHNSON,
Chief Deputy Clerk.

[10-cent U. S. internal-revenue stamp, canceled Nov. 2, '99. A. W. J.]

3 [Endorsed:] S. F., 1720. In the supreme court of the State of California. Southern Pacific Railroad Co. *vs.* Isaac T. Bell. Writ of error. Filed Oct. 17, 1899. Geo. W. Root, clerk, by A. W. Johnson, deputy.

4 In the Supreme Court of the State of California.

SOUTHERN PACIFIC RAILROAD COMPANY, Appellant,
vs.
ISAAC T. BELL, Respondent.
} San Francisco, No. 1720.

Transcript on appeal.

Wm. Singer, Jr., and H. V. Reardan, attorneys for appellant, San Francisco.

W. B. Wallace, Esq., attorney for respondent, Visalia.

Filed this Dec. 3, 1898, *day of —, A. D. 1898.*
T. H. WARD, *Clerk,*
By R. A. MARSHALL,
Deputy Clerk.

5 In the Supreme Court of the State of California.

Transcript on Appeal.

In the Superior Court of the State of California in and for the County of Fresno.

THE SOUTHERN PACIFIC RAILROAD COMPANY, Plaintiff,
vs.
ISAAC T. BELL, Defendant.

Complaint.

Complaining of the defendant, the plaintiff alleges:

6 First. That it is, and at all the times hereinafter mentioned was, a corporation, duly organized and existing by and in virtue of the laws of the State of California.

Second. Section 18 of the act of Congress entitled, "An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast,"

approved July 27th, 1866, authorized and empowered the plaintiff to connect with the Atlantic and Pacific railroad at such point near the boundary line of the State of California as they should deem most suitable for a railroad line to San Francisco, and to construct a railroad from such point to San Francisco. To aid in the construction of such railroad, the said act granted to the plaintiff every alternate section of public land, not mineral, designated by odd numbers, to the amount of ten alternate sections of land per mile on each side of the railroad it authorized the plaintiff to construct, whenever on the line thereof the United States had full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road should be designated by a plat thereof, filed in the office of the Commissioner of the General Land Office; and the said act further provided, that whenever, prior to said time, any of the said
7 sections were granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands should be selected by the plaintiff in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, designated by odd numbers, not more than ten miles beyond the limits of the said first-mentioned sections. The said act of July 27th, 1866, as printed in the 14th United States Statutes, at page 292 and following, is referred to and made a part of this complaint.

Third. On or before January 3d, 1867, the plaintiff duly fixed the general route of the entire line of railroad which the said act of July 27th, 1866, authorized it to construct; and on January 3d, 1867, the line of the said railroad was designated by a plat thereof filed on that day in the office of the Commissioner of the General Land Office. The said general route, plat and designation of line were duly approved and accepted by the Commissioner of the General Land Office and Secretary of the Interior, and on March 22d, 1867, the said Commissioner, pursuant to the order of the said Secretary, withdrew all the odd-numbered sections of land lying within thirty miles of the railroad shown upon the said plat, from sale or location, pre-emption or homestead entry; and the said sections have ever since remained so withdrawn, by virtue and force of the
8 said withdrawal, and the provisions of section 6 of the said act. On June 28th, 1870, a joint resolution was adopted by Congress, entitled, "Joint resolution concerning the Southern Pacific Railroad of California," which is printed in the 16th United States Statutes, at page 382 and following, and made a part of this complaint.

Fourth. On or about November 26th, 1866, the plaintiff duly accepted the terms, conditions and impositions of the said act of July 27th, 1866. Thereafter, within the time allowed by law, and prior to November 8th, 1889, the plaintiff duly constructed and equipped the entire railroad provided for in the said act, extending from San Francisco to Tres Pinos, and from Alcalde to the Needles, in seventeen several sections, and along the line designated upon the said plat filed on January 3d, 1867; and prior to the said date,

commissioners duly appointed by the President of the United States for that purpose, duly examined the said railroad as constructed, and duly reported to the President of the United States that the said railroad had been completed in a good, substantial and workmanlike manner, and in all respects as required by the said act, and all such reports except those upon that part of the said road which extends from Mojave to the Needles, were duly accepted and approved by the President of the United States and the Secretary of the Interior. And on and prior to the last-mentioned date the plaintiff filed with the Secretary of the Interior, and the said
9 Secretary duly accepted and approved, a map of each of the said seventeen sections of railroad, as the same had been definitely located and constructed.

Fifth. The S. E. ¼ of section 5, township 23 south, range 23 east, Mount Diablo meridian, containing 160 acres, is a part of an odd-numbered section within twenty miles on one side of the line of railroad shown on the said map filed January 3d, 1867, and within twenty miles on one side of the said railroad as constructed and shown on the said maps of definite location and construction; and all of the said land was granted and otherwise disposed of by the United States, prior to the time when the line of the said railroad was designated by the plat thereof filed in the office of the Commissioner of the General Land Office, as aforesaid.

Sixth. The N. E. ¼ of section 7, township 17 south, range 16 east, Mount Diablo meridian, containing 160 acres is situated in the county of Fresno, in the State of California; and is a part of an odd-numbered section distant more than twenty miles from, but lying within thirty miles on one side of, the line of railroad shown on the said map filed January 3d, 1867, and distant more than twenty miles from but lying within thirty miles on one side of the said railroad as constructed, and as shown on the map of
10 definite location and construction thereof. The lands in this paragraph described are opposite to and coterminous with the section of said railroad extending from Huron to Alcalde; the map of definite location and construction of which was filed in the office of, and duly accepted and approved by, the Secretary of the Interior, on or before April 13th, 1889.

Seventh. At the time the said act of July 27th, 1866, was passed, the land described in the 6th paragraph hereof was vacant and unappropriated public land of the United States, not mineral, to which the United States then had full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights; and the said land has ever since so remained, excepting only as it has been affected by the said act of Congress, the said withdrawals, and the acts of the parties to this suit, herein set forth.

Eighth. The land described in the 6th paragraph hereof is within the district of lands subject of sale and proceedings in the United States land office at Visalia, in the State of California; and a plat of the survey of said land, duly approved by the United States surveyor general, and the Commissioner of the General Land Office, was filed in the said land office on June 10th, 1861. On July 26th,

1893, the plaintiff filed its list No. 66 in the said land office, se-
11 lecting the land described in the 6th paragraph hereof in lieu of the land described in the 5th paragraph hereof. The said list was in the form, and accompanied by the certificates, affidavits, costs and fees required by law and the rules and regulations prescribed by the Secretary of the Interior and the Commissioner of the General Land Office; and by the filing of the same, accompanied as aforesaid, the plaintiff duly selected, under the direction of the Secretary of the Interior, the land described in the 6th paragraph hereof, by and in virtue of the grant and provisions of the said act of July 27th, 1866. The plaintiff had not at the time the said selection was made, nor has it since, selected or received lands to the extent or amount earned and acquired by it in virtue of the grant and provisions of the said act; nor has it selected or received any land other than that described in the 6th paragraph hereof, in lieu of the land described in the 5th paragraph hereof.

Ninth. By and in virtue of the provisions of, and the grant made to the plaintiff by the said act of July 27th, 1866, and the matters and things hereinbefore set forth, on July 26th, 1893, the plaintiff became entitled to the issue by the United States of a patent conveying to it the legal title to the land described in the 6th paragraph of this complaint; and the plaintiff at that time, and con-
12 tinuously ever since, duly demanded the issuance of such patent, but the United States, and all officers thereof, have at all times refused to issue the same.

Tenth. Notwithstanding the premises, and wholly disregarding the rights and title of the plaintiff, on or about September 15th, 1892, the United States, without lawful authority, issued and delivered its patent conveying the legal title of the land described in the 6th paragraph hereof, to the defendant; and the defendant claims that the said patent conveyed the legal title of the said land in fee-simple absolute to him, free from any trust for, or obligation to convey the same to, the plaintiff. But, in fact, the said patent conveyed the legal title in trust for the plaintiff, and whoever held the legal title of said land on July 26th, 1893, or at any time since, has held the same in trust for, and under obligation to convey the same to, the plaintiff; and the claims of the defendant to the contrary are pretenses, wholly without right.

Eleventh. After the said patent issued, and prior to the commencement of this suit, the plaintiff duly demanded of the defendant conveyance to it of the title conveyed by the said patent; but the defendant has, at all times, refused the same.

Twelfth. That the defendant at all times had full knowledge of all the matters and things in this complaint set forth.

13 Wherefore, the plaintiff prays the decree of this court that it is the rightful owner of the land described in the 6th paragraph of this complaint; that the defendant holds the legal title of said land in trust for, and requiring him to convey the same to, the

plaintiff, free of all incumbrances; and for such other and further relief as the nature of this case may require—with costs of suit.

WM. SINGER, JR., AND
H. V. REARDAN,
Attorneys for the Plaintiff.

Duly verified.

(Endorsed:) "Filed August 9th, 1897."

(Title of Court and Cause.)

Demurrer.

Now comes defendant and demurs to plaintiff's complaint, and for grounds of demurrer, alleges:

1. That said complaint does not state facts sufficient to constitute a cause of action.

2. That plaintiff's cause of action, if any it has, is barred by the provisions of section 318, subdivision 4 of section 338, and section 343 of the Code of Civil Procedure of said State.

3. That plaintiff is barred by its laches from obtaining relief herein, in delaying to assert any claim to said land, in delay-
14 ing to file its map of definite location, in delaying its application to select said land, and to commence this action.

Wherefore, defendant prays judgment for his costs herein.

W. B. WALLACE,
Attorney for Defendant.

(Endorsed:) "Filed April 20th, 1898."

(Minute Book, vol. 16, dept. 1, page 218.)

In the Superior Court of the County of Fresno, State of California.

FRESNO, CAL., *July 27th*, 1898.

The court convened.

Present: Hon. E. W. Risley, judge; F. C. Scott, deputy sheriff; Ed. E. Bush, deputy clerk.

Order Sustaining Demurrer.

S. P. R. R. Co.
vs.
ISAAC T. BELL. } No. 7919.

It is ordered that the demurrer of defendant to the complaint of plaintiff be and it is hereby sustained, and said plaintiff is hereby granted ten days in which to amend.

15 (Title of Court and Cause.)

Judgment.

In the above-entitled cause, the demurrer to plaintiff's complaint having been sustained and leave granted to plaintiff to amend, and

plaintiff having made default, and having failed to amend its said complaint within the time allowed by law and order of this court,

It is, by the court, hereby ordered, adjudged and decreed, that plaintiff take nothing by this action, and that defendant have and recover of and from plaintiff his costs in said action, amounting to the sum of — dollars.

Judgment rendered on the 15th day of August, 1898.

E. W. RISLEY,
Superior Judge.

(Endorsed:) "Filed August 15th, 1898."

(Title of Court and Cause.)

Notice of Appeal.

Take notice that the plaintiff above named hereby appeals to the supreme court of the State of California from the judgment of the above-named court rendered and entered in favor of the de-
16 fendant, and against the plaintiff, August 15, 1898, and from the whole thereof.

WM. SINGER, JR., AND
H. V. REARDAN,
Attorneys for Plaintiff.

To W. B. Wallace, Esq., attorney for defendant, and to T. G. Hart, Esq., clerk of the said court.

Dated October 14th, 1898.

(Endorsed:) "Filed Oct. 15, 1898."

(Title of Court and Cause.)

Stipulation.

It is stipulated that the foregoing papers are true and correct copies of the papers contained in the judgment-roll and on file in the office of the clerk of said court, and that the same constitute the transcript on appeal herein.

It is further stipulated that all of the said papers were served and filed in due time.

It is further stipulated that a good and sufficient undertaking on appeal herein has been filed, and may be omitted from this transcript.

W. B. WALLACE,
Attorney for Respondent.

17 Due service of the within by copy is hereby admitted this 19th day of November, 1898.

W. B. WALLACE,
Attorney for Respondent.

I hereby certify that a copy of the within was this 28th day of November, 1898, deposited with me for the judge of the superior court of Fresno county, State of California.

[SEAL.]

T. G. HART,
Clerk of said Superior Court,
By —— ——,
Deputy Clerk.

18 Filed May 26, 1899.

Department One.

SOUTHERN PACIFIC RAILROAD COMPANY, Appellant,
vs.
FRANK A. WOOD ET AL., Respondents,

and

SOUTHERN PACIFIC RAILROAD COMPANY, Appellant,
vs.
FREDERICK B. JACK ET AL., Respondents.

} L. A., No. 445.

These cases depend upon the same facts and are submitted together. They involve a contest as to certain lands lying within the indemnity limits of the grant to plaintiff by act of Congress of July 27, 1866, the plaintiff claiming under said grant, and the defendants claiming under patents issued to them as settlers under the land laws of the United States. The defendants demurred to the complaints in both cases, the demurrers were sustained, and these appeals are taken by the plaintiff from the judgments thereupon entered against it.

Said act of Congress, upon which the plaintiff bases its claim to said lands, is entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast." 14 U. S. Stats., 292. Said act incorporated the Atlantic and Pacific Railroad Company, and by the third section granted certain lands to aid in its construction. It provided that where the road passed through the Territories of the United States the odd sections within forty miles of the road, and where it passed through any State ten alternate sections per mile, designated by odd numbers, were granted, making the primary limits within the Territories forty miles, and within the States twenty miles on each side of the road; the grant being of lands to which "the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is designated by a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever prior to said time any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and

designated by odd numbers, not more than ten miles beyond the limit of said alternate sections, and not including the reserved numbers."

Section 6 of said act is as follows:

"And be it further enacted: That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road after the general route shall be fixed, and as fast as may be required by the said railroad; and the odd sections of land hereby granted shall not be liable to sale or entry, or pre-emption, before or after they are surveyed, except by said company, as provided in this act; but the provisions of the act of September, 1841, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled 'An act to secure homesteads to actual settlers on the public domain,' approved May 20, 1862, shall be and the same are hereby extended to all other lands on the line of said road when surveyed, excepting those hereby granted to said company."

Section 18 of said act authorized The Southern Pacific Railroad Company (the appellant here) to connect with said Atlantic and Pacific railroad at such point near the boundary line of the State of California as they shall deem most suitable for a railroad line to San Francisco; "and in consideration thereof, to aid in its construction, shall have similar grants of land, subject to all the conditions and limitations herein provided, and shall be required to construct its road on the like regulations, as to time and manner, with the Atlantic and Pacific railroad herein provided for."

The complaint alleged the substance of said section 18, and referred to said entire act as printed in said statutes, and made it part thereof. It then alleged that before January 3, 1867, plaintiff "fixed the general route" of the entire line of railroad it was authorized to construct, and on that day filed a map thereof in the General Land Office, that the same was approved by the Commissioner, that on March 22, 1867, said Commissioner, pursuant to the order of the Secretary of the Interior, withdrew all the odd-numbered sections of land lying within thirty miles of the line of said road as shown upon said map, from sale or location, pre-emption or homestead entry, and that the same have ever since remained so withdrawn; that on June 28, 1870, a joint resolution was passed by Congress (16 Stats., 382) authorizing appellant to construct its road as near as may be on the route indicated by its map of 1867; that prior to November 8, 1889, and within the time allowed by law, it completed its entire road along the line designated by said map, that its road was accepted, and that on and prior to November 8, 1889, it filed with the Secretary of the Interior a map of each of the sections of said road "as the same had been definitely located and constructed," and the same were accepted and approved by said Secretary.

The fifth paragraph of the complaint described certain lands, parts of odd sections within the twenty-mile or place limits, which were lost to it, and the sixth paragraph described the lands now in controversy, which are situated within the indemnity limits de-

scribed in said act, and alleged that they are opposite to and coterminous with the section of said road extending from Huron to Alcalde, "the map of definite location and construction of which was filed in the office of, and duly accepted and approved by, the Secretary of the Interior, on October 8, 1889."

The complaint further alleges that at the time the act of July 27, 1866, was passed the lands here in controversy were vacant and unappropriated public land of the United States, not mineral, and not reserved, etc., and that they have ever since so remained, excepting only as they have been affected by said act of Congress, the said withdrawals, and the acts of the parties to this suit; that said lands were surveyed and plat filed May 1, 1874; that "on October 19, 1891, the plaintiff filed its list No. 44 in said land office, selecting the lands described in the sixth paragraph hereof in lieu of the lands described in the fifth paragraph;" that it thereby became entitled to a patent from the United States to the lands in question; that at that time, and ever since, plaintiff has demanded the issuance of such patent, but the United States and every officer thereof have at all times refused to issue it; that disregarding the rights of the plaintiff, a patent was issued to defendant Wood on October 30, 1888, conveying the legal title to him, that he took the legal title in trust for the plaintiff, that a conveyance has been demanded, etc. The prayer is that plaintiff be adjudged to be the owner, and that defendants convey the title to it.

Defendants' demurrer stated three grounds: 1st. That said complaint does not state facts sufficient to constitute a cause of action. 2nd. That plaintiff's cause of action is barred by the provisions of subdivision 4 of section 338, and sections 318 and 343 of the Code of Civil Procedure; and, 3rd. That plaintiff has been guilty of gross laches in delaying to bring suit after the issuance of the patent to Wood, and after filing its selection.

Appellant, in its brief, states its first point thus: "The facts stated in the second amended complaint show the legal title to be in the plaintiff." If that were true there could be no reason why it should resort to equity to compel a conveyance. But in the complaint it is alleged that the defendants have the "legal title," and, upon the theory that plaintiff has a prior and better right, seeks to compel a conveyance.

Whatever right the plaintiff asserts, or may have, is based upon said act of Congress of 1866, and its own acts thereunder, while defendants' rights are based upon the pre-emption laws of the United States, and their compliance therewith; and, as defendants' patent was issued prior to the selection of the same lands by the plaintiff, they must have the better right if said lands were subject to pre-emption; and that they were so subject, unless withdrawn from pre-emption by the act of 1866, or by executive action thereunder, is not questioned.

Section 6 of said act (above quoted) provides: "And the odd sections of land hereby granted shall not be liable to sale, or entry, or pre-emption, before or after they are surveyed, except by said company as provided in this act;" but it is further provided that the

pre-emption act of 1841, and the homestead act of 1862, and the acts amendatory thereof, "shall be and the same are hereby extended to all other lands on the line of said road when surveyed, excepting those *hereby granted* to said company."

If it be true, as contended by the learned counsel for plaintiff, that the "odd sections of land hereby granted" includes the odd sections within the indemnity limits, there could have been no reason for the provision that the homestead and pre-emption laws should extend "to all other lands on the line of said road," since the even-numbered sections were in nowise affected by the grant.

But aside from this provision of the act it is well settled that the words "hereby granted" do not include the odd sections within the indemnity limits, and therefore it cannot be true that upon selection the title relates back to the date of the act. As to lands within the place or primary limits, it is uniformly held that the words "be and is hereby granted" import a grant *in presenti*, and when the lands are ascertained by fixing the line of the road in the manner prescribed in the act, the title of the grantee relates back to the date of the act, but does not attach to lands to which the United States did not have full title at that date, or were otherwise excepted from the operation of the grant, even though they should afterwards be freed from the claim or possession which excluded them under the terms of the grant. Newhall *vs.* Sanger, 92 U. S., 761. But, as to indemnity lands, it is sufficient if they are free from private claim at the time of their selection by the railroad company. Ryan *vs.* Railroad Co., 99 U. S., 382. In Newhall *vs.* Sanger an odd section within the place limits was covered by a Mexican grant which was *sub judice* at the date of the act, but shortly afterward the Mexican grant was adjudged void, and it was held that the land did not pass under the grant to the railroad company. In Ryan *vs.* Railroad Co. the land in question was within the indemnity limits of the grant to the railroad company, and was also covered by a Mexican grant which was afterwards declared void, and was selected by the company as indemnity land, and was afterwards settled upon by Ryan as a pre-emptioner. It was held that the railroad company's selection having been approved by the Secretary of the Interior, it was entitled to the land, and the distinction between that case and Newhall *vs.* Sanger was pointed out, the court saying: "It was within the secondary or indemnity territory where that deficiency was to be supplied. The railroad company had not and could not have any claim to it until specially selected, as it was, for that purpose."

These cases settle the proposition that the lands *granted* by the act are those as to which the grant is *in presenti*, and refer only to the lands within the primary limits; and as to the indemnity lands that the title, when they are selected, does not relate back to the date of the act, but to the date of selection.

In Cedar Rapids, etc., Railroad *vs.* Herring, 110 U. S., 27, the above quotation from Ryan *vs.* Railroad Company was re-
19 peated with approval, and in addition the court said: "It is only when the line and route of the road is definitely fixed

that any right of selection exists. This must necessarily be so, because until then the quantity of land lost cannot be known, and the number of sections to be selected can only then be ascertained." The court also said (p. 38): "It is obvious, however, that the right to these odd sections, and the right to others in lieu of such odd sections as had previously been disposed of, depend upon very different circumstances, and it is not easy to see how rights can be vested in any particular section or sections of the latter class until it is ascertained how many of the original odd-numbered sections are thus lost, and until the grantee has exercised his right of selection. This latter, unlike the odd-numbered sections within the six-mile limit, are not ascertained and made specific by the protraction of the established line through the maps of the public land. They are not and cannot be made specific until the grantee's right of selection has been exercised."

This authority disposes of appellant's contention that the map of the general route, filed in 1867, fixed the limits of the indemnity lands, or operated as a withdrawal of them.

In St. Paul Railroad *vs.* Winona Railroad, 112 U. S., 732, the court said: "It is true that in some cases the statute requires the Land Department to withdraw the land within these secondary limits from the market, and in others the officers do so voluntarily. This, however, is to give the company a reasonable time to ascertain their deficiencies and make their selections. It by no means implies a vested right in said company inconsistent with the right of the Government to sell, or of any other company to select, which has the same right of selection within those limits."

If, therefore, it be true, as above stated, that the withdrawal of indemnity lands does not imply a vested right to them in the railroad company, it must be that they are not, and cannot be, included in the term "hereby granted." But Congress itself has placed a construction upon said act of July 27, 1866, or at least recognized the distinction observed by the courts between granted and indemnity lands. In the act passed July 5, 1886 (24 Stats., 123), entitled "An act to forfeit the lands granted to the Atlantic and Pacific Railroad Company," etc. (referring to the act here in question), the lands declared forfeited are described thus: "Which are adjacent to and coterminous with the uncompleted portions of the main line of said road, embraced within *both the granted and indemnity limits*, as contemplated to be constructed under and by the provisions of said act of July 27, 1866."

It is argued on behalf of appellant that the grant to it was one of quantity. But this will not bear investigation. It is clear that Congress intended to grant all the odd-numbered sections within twenty miles of the road except those that were excepted from the grant, and the privilege was given the company to select odd sections within an additional ten miles in lieu of those that were lost to it within the primary limit. But Congress did not intend either to grant ten sections on each side of the road unconditionally, or to grant all the odd sections to which the United States had full title,

and which were not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claims or rights, within the additional ten miles, since if that had been the intention all the unappropriated odd sections within thirty miles of the road would have been granted; and hence the act requires the grantee to select the lieu lands within the indemnity limits to the extent only that lands were lost within the primary limits; and, therefore, the act requires that the selection of indemnity or lieu lands shall be made by the grantee under the direction of the Secretary of the Interior; or, as expressed in some other acts granting lands in aid of railroads, subject to his approval. In either case the Secretary acts judicially. He must determine whether the alleged loss within the primary limits has in fact taken place, and whether the land selected is subject to selection. That the Secretary acts judicially, see Wisconsin Cent. R. Co. *vs.* Price County, 133 U. S., 496; and for a fuller discussion as to his powers, see Knight *vs.* U. S. Land Association, 142 U. S., 161, 176.

The complaint, it is true, alleges that appellant's selection of the land in controversy was under the direction of the Secretary of the Interior; but it is further alleged that plaintiff has demanded that a patent issue to it for said lands, and that the United States and all its officers (which includes the Secretary) have refused to issue it, and that on October 30, 1888, the United States conveyed the legal title to the defendant Wood by a patent then issued to him. The refusal to issue a patent to the plaintiff, though persistently demanded, and the further fact, distinctly alleged, that at a date some three years prior to plaintiff's selection the same land was patented to defendant Wood, is wholly inconsistent with the allegation that the selection was made under the direction of the Secretary of the Interior, and, in effect, is an allegation that the selection was not made under his direction, or approved by that officer. It is said, however, that at the date of the act (July 27, 1866) the United States had then full title, that it was not reserved, sold, granted or otherwise appropriated, and was free from pre-emption or other claims or rights; but that was before the plaintiff filed its map of the general route of its road, and said allegation is not made as of any other date than that of the act; nor is the date of defendant's settlement on the land in question alleged *non constat* that it may have been before the alleged withdrawal of the land from sale by the order of the Secretary made in March, 1867, or after its revocation on August 15, 1887. It is true it is further alleged that "said sections have ever since remained so withdrawn by virtue and force of said withdrawal;" but this allegation is a mere conclusion of law that having been once withdrawn it so remains "by virtue and force of said withdrawal," and is not the equivalent of an allegation that the withdrawal had not been revoked, while the allegation that a patent was issued to the defendant shows that, as to the land so conveyed, the withdrawal was revoked. The withdrawal, however, was in fact revoked on August 15, 1887, by executive order after a rule to show cause was served upon the Atlantic and Pacific Company and the Southern Pacific Company, and after each of said companies

had filed answers thereto. For the proceedings and action of the Secretary of the Interior in relation thereto, see 6 Dec. Dep. Int., 77 to 93. This is a public record of which the court takes judicial notice, and such action, being within the power of the Department of the Interior, is conclusive, and might be properly considered even if the complaint had alleged that the withdrawal had not been revoked.

It is said by counsel for appellant that "where all the undisposed of odd sections within the exterior limits of the grant are insufficient to make up the quantity granted, there need be no selection; and by definite location the grantee perfects the same title to the lands within the secondary or indemnity limits as to those in the primary limits;" citing St. P. & Pac. R. Co. *vs.* N. P. R. R. Co., 139 U. S., 19.

As to the first part of this statement the case cited held that, as all the lands within the indemnity limits only made up in part for the deficiencies, there was no occasion for the exercise of the judgment of the Secretary in selecting from them, for they were all appropriated.

The controversy there was as to the respective rights of two different railroad corporations claiming under different grants the same indemnity lands, and not as to the right of either company to a specific parcel as against a claimant under the homestead or preemption laws; and therefore it was only necessary to determine whether all the odd sections within the indemnity limits were required to indemnify the company having the prior right for its losses within the place limits, these lands having been withdrawn by the Land Department for the benefit of the Northern Pacific Company; and the language used by the court must be read in the light of these facts; and in a later case (United States *vs.* Colton Marble & Lime Co., 146 U. S., 616) the above case (139 U. S., 19) was cited, and the court said: "The ordinary rule with respect to lands within the indemnity limits is that no title passes until selection. Where, as here, the deficiency within the granted limits is so great that all the indemnity lands will not make good the loss, it has been held, *in a contest between two railroad companies*, that no formal selection was necessary to give them to the one having the older grant, as against the other company." But, however that may be, in the case at bar it is not alleged that all the odd sections within the indemnity limits are required to make up appellant's deficiencies within the primary limits, or that there are no other lands available for that purpose than those in controversy.

As to the second branch of appellant's contention, viz: that by the map of definite location the grantee perfects the same title to the indemnity lands as to those within the primary limits, but one case is cited which sustains that contention. That is the case of Railroad Co. *vs.* Barnes, 2 North Dak., 310; 51 N. W., 386, a case which was expressly overruled in Grandin *vs.* La Bar, 3 N. D., 446, 455, in an able opinion to which we refer in support of our conclusions in this case. In that case (page 453) it was said: "But it required something more than the existence of the grant, and the

location and construction of the road in accordance with the terms of the grant, to vest the title to such additional lands in the company. It required a legal selection; and until such selection was made, and the legality of the selection in some manner established, the company could claim no right or interest whatever in any specific tract within the indemnity belt." Citing Ryan *vs.* Railroad Co., 99 U. S., 382; Grinnell *vs.* Railroad Co., 103 U. S., 739; Railroad *vs.* Herring, 110 U. S., 27; Kansas Pac. R. Co. *vs.* Atchison, etc., R. Co., 112 U. S., 414; Wisconsin Cent. R. Co. *vs.* Price County, 133 U. S., 496, and other cases.

In a supplemental brief appellant cites the case of Southern Pac. R. Co. *vs.* Groeck, decided by the circuit court of appeals, ninth circuit, and reported in 87 Fed. Rep., 970. That case arose under the same grant which is the basis of appellant's claim in this case, and in most of its features is entirely similar, and it is urged that as the case before us involves Federal questions, that the decision of the circuit court of appeals should be followed by this court; but I think that the opinion in that case is not sustained by the decisions of the Supreme Court of the United States upon vital questions involved in it, even if it were not distinguishable from the case before us in certain of its features. For example, it is there said: "A careful consideration of other decisions of the Supreme Court determining the nature of the right which the grantee of such a grant acquires to lands within the indemnity limits, prior to the time when definite location and selection of lieu lands is made, leads us to the conclusion that, in the case of a grant such as that now under consideration, by the operation of *the terms of the grant itself* the indemnity lands *are withdrawn* from settlement from the moment when a map of the general route of the road is made and filed. It may be deduced from those decisions that the grant to the appellant conferred upon the grantee, within the indemnity limits, more than a mere right to initiate a title by selection, and that the lands in the indemnity limits are as truly *granted lands*, within the terms of the act, as are the lands within the place limits. The difference is in the preliminary steps which are requisite to attach the title to the particular tracts which are granted." Citing St. Paul & S. C. R. Co. *vs.* Winona & St. P. R. Co., 112 U. S., 720, and St. Paul & P. R. Co. *vs.* Northern Pac. Co., 139 U. S., 1. (The italics are ours.)

The latter case has been already noticed, and the facts which make it broadly distinguishable from the Groeck case, and the one at bar, need not be repeated. In St. Paul Railroad *vs.* Winona Railroad, the controversy arose under a grant to the Territory of Minnesota for the benefit of several roads, both parties claiming under the same grant, and it was held that title to the lands within the primary limits relates, after the road is located according to law, to the date of the grant, while as to indemnity lands neither priority of grant, nor priority of location or of construction, gives priority of right, but this is determined by priority of selection, where the selection is made according to law. In the opinion (p. 732) the court said:

"The plaintiff in error insists that the map of its line of road was filed in 1859. The court of original jurisdiction finds that, up to the time of the trial in October, 1878, a period of nearly twenty years, no selection of these lands had ever been made by that company, or any one for it. Was there a vested right in this company, during all this time, to have not only these lands, but all the other odd sections within the twenty-mile limits on each side of the line of the road, await its pleasure? Had the settlers in that populous region no right to buy of the Government because the company might choose to take them, or might, after all this delay, find out that they were necessary to make up deficiencies in other quarters? How long were such lands to be withheld from market, and withdrawn from taxation, and forbidden to cultivation?"

In Barney *vs.* Winona Railroad Co., 117 U. S., 232, Mr. Justice Field, after noticing "the well-established distinction observed between *granted* lands and *indemnity* lands," said: "It is these 'granted lands' of the prior grant falling within the six-mile limit that in our opinion are reserved, and not the possible indemnity lands which might be subsequently acquired."

The case of Buttz *vs.* Northern Pac. Railroad, 119 U. S., 55, cited by the court of appeals in the Groeck case, has no application to that case or this. There the controversy related solely to lands within the primary limits of the grant, which in that case was of all the odd sections within forty miles on each side of the road, and all of which were withdrawn by the statute from sale or preemption.

In the case of Northern Pac. Railroad *vs.* Musser Sauntry Co., 168 U. S., 604, also cited in the Groeck case, the sole question was "whether the withdrawal from sale by the Land Department in March, 1866, of lands within the indemnity limits of the grant of 1856 and 1864 exempted such lands from the operation of the grant to the plaintiff," which was made after the withdrawal; and it was held that the act of the Secretary withdrawing the lands from settlement was in effect a reservation within the terms of the later grant to the plaintiff and excepted them therefrom; but this does not support the holding in the Groeck case that the terms of the grant here under consideration operates of itself to withdraw the indemnity lands from settlement "from the moment when a map of the general route is made and filed," or that "the lands in the indemnity limits are as truly granted lands, within the terms of the act, as are the lands within the place limits."

In support of the same proposition, viz: that the grant itself withdraws the lands within the indemnity limits, the circuit court of appeals also quoted from United States *vs.* Southern Pacific Co., 146 U. S., 600, the following:

"When the general route of the road is thus fixed in good faith, and information thereof given to the Land Department by filing a map thereof with the Commissioner of the General Land Office or the Secretary of the Interior, the law withdraws from sale or preemption the odd sections to the extent of forty miles on each side. The object of the law in this particular is plain; it is to preserve

the land for the company to which in aid of the construction of the road it is granted."

This, however, was not the language of Mr. Justice Brewer, but was quoted from Buttz *vs.* Northern Pac. R. Co., 119 U. S., 71, 72, where the primary or place limits were forty miles on each side of the road, and had no reference to indemnity lands; nor did the case of United States *vs.* Southern Pac. Company have any reference to indemnity lands, but, as shown by the statement of facts, "the lands in controversy are within the granted or place limits of both the Atlantic and Pacific and the Southern Pacific Companies at the place where these lines cross;" and it was this fact that made the quotation from the Buttz case applicable.

The case of Van Wyck *vs.* Knevals, 106 U. S., 360, cited by appellant, has no application here. In the statement of facts it is said: "The lands in dispute are within ten miles of the road as built and of the line as delineated on the map." They were in the place limits, and not indemnity lands.

In the Groeck case the court said: "After such lands have been once set aside by congressional act no authority is vested in the Secretary of the Interior, or in any officer of the Land Department, to restore them or open them to settlement." That is conceded; but it is clear that the indemnity lands were not set aside by "congressional act." As to the lands within the *place limits* section 6 of the act provided that "the odd sections of land *hereby granted* shall not be liable to sale or entry," except by the company; but the same section further provided that the homestead and pre-emption laws "*shall be*, and the same are hereby, extended to all other lands on the line of said road when surveyed, excepting those *hereby granted* to said company."

It has been often decided, as we have seen, that the words "hereby granted" import a grant *in presenti*, which vests the title in the grantee as of the date of the grant. The expression "all other lands" must therefore include the indemnity lands, the title to which, when selected and approved, relates to the date of selection; and as to these lands the pre-emption and homestead laws were expressly extended. The only debatable question, therefore, is whether the Land Department had authority to withdraw said indemnity lands from settlement; and upon this question Mr. Secretary Lamar expressed the opinion that the act deprived the department of that power. See 6 Dec. Dep. Int., pp. 87 to 91. But it is not necessary to a decision of the present case to decide that question, for as these lands were not withdrawn by force of the act of Congress, and the withdrawal having been revoked, and as the complaint does not allege that Wood's settlement was made before the revocation, or while they were withdrawn, it is not shown that his settlement was illegal or unauthorized, or that the patent was improperly issued.

In a supplemental brief, filed by respondent, our attention is called to the case of Moore *vs.* Cormode, decided by the supreme court of Washington December 5, 1898 (55 Pac. Rep., 217). That case arose under the grant to the Northern Pacific railroad, the language as to the indemnity lands being the same as in the grant

to the appellant, and the general facts being the same as here. The plaintiff was the grantee of the railroad company, and the action was brought to cancel defendants' patent, and to obtain possession.

We should like to quote largely from the opinion, but must content ourselves with a single sentence:

"After a consideration of the numerous cases cited in the briefs, we are of the opinion that the grant did not take effect as to any lands within the indemnity limits until actually selected by the company, and that prior thereto they were open to settlement."

In view of the conclusion reached upon the first ground of demurrer it is not necessary to consider either the second or third grounds.

I advise that the judgment appealed from be affirmed.

HAYNES, *C.*

We concur:
BRITT, *C.*
GRAY, *C.*

For the reasons given in the foregoing opinion the judgment appealed from is affirmed.

GAROUTTE, *J.*
VAN DYKE, *J.*
HARRISON, *J.*

21 Appeal from superior court of Fresno county.

For appellant, Wm. Singer, Jr., and H. V. Reardon.
For respondent, W. B. Wallace.

Filed August 2, 1899.

In Bank.

SOUTHERN PACIFIC RAILROAD CO., Appellant, *vs.* ISAAC T. BELL, Respondent. } S. F., No. 1720.

By the COURT:

On the authority of Southern Pacific Co. *vs.* Wood, 57 Pac. Rep., 388, the judgment in this case is affirmed.

22 In the Supreme Court of the State of California. Bank.

SOUTHERN PACIFIC COMPANY, Appellant, *vs.* ISAAC T. BELL, Respondent. } S. F., No. 1720. On Appeal from the Superior Court in and for the County of Fresno.

And now, at this day, this cause being called and having been heretofore submitted and taken under advisement, and all and singular the law and premises having been fully considered, the opinion of the court herein is delivered by the court.

Whereupon it is adjudged and decreed by the court that the judgment of the superior court in and for the county of Fresno in the above-entitled cause be, and the same is hereby, affirmed.

I, Geo. W. Root, clerk of the supreme court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above-entitled cause on the 2nd day of August, 1899, and now remaining of record in my office.

Witness my hand and the seal of the court, affixed at my office, this 2nd day of September, A. D. 1899.

[SEAL.]

GEO. W. ROOT, *Clerk*,
By A. W. JOHNSON,
Chief Deputy.

23 [Endorsed:] S. F., No. 1720. In the supreme court, State of California. Remittitur. Southern Pacific Co. *vs.* Bell. Clerk's costs, $—; paid by appellant, $10.00; paid by respondent, $—. Total, $10.00. Geo. W. Root, clerk, by A. W. Johnson, deputy.

24 In the Supreme Court of the State of California.

SOUTHERN PACIFIC RAILROAD COMPANY, Plaintiff,
vs.
ISAAC T. BELL, Defendant.

Assignment of Errors.

The plaintiff, by its attorney and counsel, in connection with its petition for writ of error herein, says that the judgment and decree of the supreme court of the State of California rendered in the above-entitled cause is erroneous and against its just rights in the following particulars:

I.

The court erred in (*a*) sustaining the defendant's demurrer to the plaintiff's complaint, (*b*) adjudging that the plaintiff take nothing, and (*c*) adjudging that the defendant have and recover his costs from plaintiff.

II.

The court erred in not holding and adjudging:

1st. That the act of Congress approved on July 27th, 1866, referred to in the plaintiff's complaint, granted unto the plaintiff an equitable interest in the land sought to be recovered by the plaintiff from the defendant, and herein that the legal title (if any) conveyed by the United States to the defendant is subordinate to and
25 subject to the control of the plaintiff's equitable right.

2nd. That by the self-operating force of the said act of July 27th, 1866, the land sought to be recovered by the plaintiff from the defendant was reserved for the exclusive benefit of and to satisfy the grant made *made* by that act to the plaintiff; which reservation

took effect on January 3rd, 1867, when the plaintiff's map of general route was filed with and accepted by the Secretary of the Interior, and has remained in force since that date continuously.

3rd. That Congress, by its joint resolution, approved on June 28th, 1870, referred to in the plaintiff's complaint, ratified and confirmed the grant made to plaintiff by the said act of July 27th, 1866, along the line designated by the said plat of January 3rd, 1867.

4th. That the land sought to be recovered has at all times since January 3rd, 1867, remained withdrawn from the public domain for the exclusive benefit of the plaintiff's said grant, and that at all times since that date the land officers of the United States have remained wholly without authority or power to release such withdrawal or dispose of the said land otherwise than to the plaintiff.

5th. That the plaintiff became entitled to a patent from the United States for the land in suit upon its selection thereof on July 26th, 1893, and whosoever at that time held the legal title
26 for said land held it in trust for and under obligation to convey the same to the plaintiff.

6th. That the patent issued by the United States to the defendant, referred to in the plaintiff's complaint, was and is a conveyance to the defendant in trust for the plaintiff, and the defendant must convey to the plaintiff such title as he received by that patent free of incumberance.

III.

The court erred in assuming and holding, against the express allegations of the plaintiff's complaint to the contrary:

1st. That the "defendant's rights are based on the pre-emption laws of the United States and compliance therewith."

2nd. That "it is said, however, that at the date of the act (July 27, 1866), the United States had full title; that it was not reserved, sold, granted, or otherwise appropriated, and was free from pre-emption or other claims or rights; but that was before the plaintiff filed its map of the general route of its road, and said allegation is not made as of any other date than that of the act."

3rd. That the plaintiff's selection of the land in suit was not made under direction of the Secretary of the Interior.

IV.

The court erred in holding and deciding:

1st. That the words "hereby granted," as used in the act of Congress approved on July 27th, 1866, referred to in the plaintiff's complaint, "do not include the odd sections within the indemnity limits."

2nd. That the land in suit was subject to pre-emption entry or sale after filing of the plaintiff's general route map on January 3rd, 1867.

27 3rd. That the said land was subject to any claim or right of the defendant at any or either of the times when the

plaintiff's grant was made, the plaintiff's general route map filed, the plaintiff's road definitely located, the plaintiff's selection made, or the said suit commenced.

4th. That the plaintiff at any time had or claimed any right, title, or interest in or to the land in suit, except such as arose out of and originated with the patent referred to in the plaintiff's complaint.

5th. That the patent referred to in the plaintiff's complaint conveyed unto the defendant any title to the said land for himself or otherwise than in trust for the plaintiff.

The plaintiff prays that the said judgment and decree be reversed, and that the mandate of the United States Supreme Court issue, directing judgment and decree for plaintiff, as prayed in its complaint.

H. V. REARDAN,
Attorney for Plaintiff.

WM. SINGER, JR.,
Counsel for Plaintiff.

Endorsed: Filed October 7th, 1899. Geo. W. Root, clerk, by F. T. Barnet, deputy.

28 In the Supreme Court of the State of California.

SOUTHERN PACIFIC RAILROAD COMPANY, Plaintiff,
vs.
ISAAC T. BELL, Defendant.

Petition for Writ of Error.

To the Honorable W. H. Beatty, chief justice of the supreme court of the State of California:

It is most respectfully shown that your petitioner, The Southern Pacific Railroad Company, as plaintiff, brought the above-entitled suit against Isaac T. Bell, as defendant, in the superior court of the State of California in and for the county of Fresno, by filing its complaint therein on August 9th, 1897; on April 20th, 1898, the defendant filed his demurrer to the plaintiff's said complaint; on July 27th, 1898, after argument and consideration thereof, the said superior court made its order sustaining the said demurrer and allowing the plaintiff ten days within which to amend its said complaint, and on August 15th, 1898, the plaintiff having refused to amend its said complaint, the said superior court rendered its judgment ordering, adjudging, and decreeing that the plaintiff take nothing by its said suit or action, and that the defendant have and recover his costs from plaintiff.

On October 14th, 1898, within the time allowed by law therefor, the plaintiff duly appealed to this court from the said judg-
29 ment, order, and decree; and on August 2nd, 1899, after argument and consideration, this court affirmed the said judgment, order, and decree of the superior court.

In the said suit or action the plaintiff specially claimed a title, right, privilige, immunity, and authority exercised under a statute of the United States, and by the said suit or action, the proceedings therein, and the final judgment and decree of this court there was drawn in question, necessarily involved, and passed upon the validity of a statute of and authority exercised under the United States, where a title, right, privilige, and immunity was specially claimed by the plaintiff under a statute of and authority exercised under the United States and the decision of this court was and is against the title, right, privilege, and immunity specially set forth and claimed by the plaintiff under such statute and authority.

The plaintiff, Southern Pacific Railroad Company, being dissatisfied with the said judgment, order, and decree made by the superior court in this suit or action, and with the judgment, order, and decree of this court affirming the same, and feeling aggrieved thereby, most respectfully prays that it be allowed to prosecute a writ of error herein to the Supreme Court of the United States in pursuance of the laws of the United States in that behalf made and provided.

H. V. REARDAN,
Attorney for Plaintiff.

WM. SINGER, JR.,
Counsel for Plaintiff.

30 The foregoing petition is allowed, a supersedeas bond in the sum of $500 to be filed by the petitioner.

Sixth October *6th*, 1899.

W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

Endorsed: Filed October 7th, 1899. Geo. W. Root, clerk, by F. T. Barnet, deputy clerk.

31 In the Supreme Court of the State of California.

SOUTHERN PACIFIC RAILROAD COMPANY, Plaintiff,
vs.
ISAAC T. BELL, Defendant.

Bond.

We, J. Kruttschnitt and F. S. Douty, of the city and county of San Mateo, State of California, are held and firmly bound unto Isaac T. Bell in the sum of five hundred (500) dollars, to be paid to him, his heirs, executors, or administrators; for the payment of which, well and truly to be made, we bind ourselves, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

The Southern Pacific Railroad Company, plaintiff above named, has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment and decree rendered in the above-entitled court and cause, and the condition of this obligation is that

if the Southern Pacific Railroad Company shall prosecute its said writ of error to effect and answer all costs if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force.

Dated, signed, and sealed on October 6th, 1899.

J. KRUTTSCHNITT. [SEAL.]
F. S. DOUTY. [SEAL.]

32 STATE OF CALIFORNIA, } ss:
City and County of San Francisco, }

J. Kruttschnitt and F. S. Douty, being duly sworn, each and for himself, says:

I am one of the sureties to the foregoing bond and subscribed my name thereto. I am a resident and freeholder of the State of California, and am worth the sum of five hundred dollars, over and above all my just debts and liabilities, in property situated in the State of California which is not exempt from execution.

J. KRUTTSCHNITT.
F. S. DOUTY.

Subscribed and sworn to before me on October sixth (6th), 1899.

[SEAL.] E. B. RYAN,
Notary Public in and for the City and County of San Francisco, State of California.

The foregoing bond approved on October 6th, 1899.

W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

Endorsed: Filed October 7th, 1899. Geo. W. Root, clerk, by F. T. Barnet, deputy clerk.

33 UNITED STATES OF AMERICA, ss:

To Isaac T. Bell, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held in the city of Washington, District of Columbia, on December 6th, 1899, pursuant to a writ of error filed in the office of the clerk of the supreme court of the State of California, wherein The Southern Pacific Railroad Company, plaintiff, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the — plaintiff in error, in the said writ of error mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable W. H. Beatty, chief justice of the supreme court of the State of California, on this October 17th, 1899.

W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

Service of the foregoing citation is admitted on October 19, 1899.

W. B. WALLACE,
M. K. HARRIS,
Attorney- for Defendant in Error.

34 [Endorsed:] S. F., 1720. In the supreme court of the State of California. Southern Pacific Railroad Co. *vs.* Isaac T. Bell. Citation. Filed Oct. 30, 1899. Geo. W. Root, clerk, by A. W. Johnson, deputy.

35 In the Supreme Court of the State of California.

SOUTHERN PACIFIC RAILROAD COMPANY, Appellant,
vs.
ISAAC T. BELL, Respondent.
} S. F., 1720.

I, Geo. W. Root, clerk of the supreme court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of transcript, opinion in L. A., 445, So. Pac. Co. *v.* Wood; opinion in S. F., 1720, So. Pac. Co. *v.* Bell; judgment, assignment of error, petition for writ of error, bond, original citation, and original writ of error, and the same constitute the papers on writ of error, pages 1 to 31, inclusive, in the above-entitled cause, as shown by the records of my office.

Witness my hand and the seal of the court this 2nd day of November, A. D. 1899.

[Seal Supreme Court of California.]

GEO. W. ROOT, *Clerk*,
By A. W. JOHNSON,
Chief Deputy.

[10-cent U. S. internal-revenue stamp, canceled Nov. 2, '99. A. W. J.]

[Endorsed:] S. F., No. 1720. In the supreme court, State of California. Southern Pacific Railroad Company *vs.* Isaac T. Bell.

Endorsed on cover: File No., 17,570. California supreme court. Term No., 158. The Southern Pacific Railroad Company, plaintiff in error, *vs.* Isaac T. Bell. Filed November 22d, 1899.

Supreme Court of the United States

OCTOBER TERM, 1894.

Filed June 24, 1895.

THE SOUTHERN PACIFIC RAILROAD COMPANY,
Plaintiff in Error,

vs.

ISAAC T. HILL,
Defendant in Error.

In Error to the Supreme Court of California.

BRIEF FOR PLAINTIFF IN ERROR.

L. E. PAYSON,
MAXWELL EVARTS,
Of Counsel for Plaintiff in Error.

E. O. Stanwood, Printer and Binder, Boston, Mass.

3174

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 158.

THE SOUTHERN PACIFIC RAILROAD COMPANY,
Plaintiff in Error,

vs.

ISAAC T. BELL,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF CALIFORNIA.

BRIEF FOR PLAINTIFF IN ERROR.

Statement.

The Southern Pacific Railroad Company was authorized by Section 18 of the Act of Congress entitled "An Act granting lands to aid in the construction of a Railroad and Telegraph Line

from the States of Missouri and Arkansas to the Pacific Coast" and approved July 27, 1866 (14 U. S. Stat., 292), to connect with the Atlantic and Pacific Railroad at such point near the boundary line of the State of California as it should deem most suitable for a railroad line to San Francisco. To aid in the construction of the proposed road a grant of ten alternate sections of land per mile on each side of the road was given by Congress to said Southern Pacific Railroad Company whenever on the line thereof the United States had full title, not reserved, sold, granted or otherwise appropriated and free from pre-emption or other claims or rights at the time the line of said road was designated by a plat thereof filed in the office of the Commissioner of the General Land Office (Section 3 of Act of 1866).

It being understood by Congress at the time of the passage of the act that a part, and possibly a very large part, of the ten alternate sections so granted to the railroad might be "otherwise appropriated," and Congress being desirous that the railroad should have its full quota of lands to aid it in the construction of its road, it was by the same act further provided

that whenever at the time of designating the line of road any part of said ten alternate sections per mile on each side of the road should have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, other land should be selected by the Company in lieu thereof under the direction of the Secretary of the Interior, in the odd-numbered sections located not more than ten miles beyond the limits of said ten alternate sections (Section 3 of Act of 1866).

Upon the 3d of January, 1867, the plaintiff in error duly designated the line of its road by filing a plat thereof on that day in the office of the Commissioner of the General Land Office (Record, p. 3).

By the 6th section of the Act of Congress, approved July 27, 1866 (14 U. S. Stat., 292), it was provided that as soon as the general route was fixed by filing a plat thereof, designating the line of the road, the lands for forty miles in width on both sides of the line of said road should be surveyed and that the odd sections should not be liable to sale or entry or pre-emption before or after they were surveyed, except by the plaintiff in error.

At the time the line of the road was so designated (January 3, 1867), the S. E. ¼ of section 5, township 23 south, range 23 east, Mount Diablo meridian, containing 160 acres, which lay in one of the odd-numbered sections within 20 miles of the line of the road, had been granted and otherwise disposed of by the United States (Record, p. 4).

After the designation of the line of road, the plaintiff in error filed maps of the definite location of its railroad in seventeen sections, all of which maps were accepted and approved by the Commissioner and the Secretary of the Interior.

The land in controversy, which is the N. E. ¼ of section 7, township 17 south, range 16 east, Mount Diablo meridian, containing 160 acres, is situated in the County of Fresno, California, is a part of an odd-numbered section distant more than 20 miles from but lying within 30 miles of the line of the Southern Pacific Railroad as designated by the said map filed January 3, 1867, and also as definitely located and constructed, is opposite to and coterminous with the section of the Southern Pacific Railroad Company extending from Huron to Alcalde, a map of the definite location and construction of which was filed in the office of and duly accepted

and approved by the Secretary of the Interior on April 13, 1889, and was at the time of the passage of the Act of July 27, 1866, vacant and unappropriated public land, and has ever since so remained, excepting only as it has been effected by the facts set forth in the complaint (Record, p. 4).

On the 26th day of July, 1893, the plaintiff in error duly selected the land in question in lieu of the 160 acres heretofore referred to within the place limits of the grant which had been previously disposed of by the United States at the time of filing the plat designating the line of the road (January 3, 1867).

This selection was made in proper form and in all respects as required by the instructions issued by the Secretary of the Interior, and under the direction of the Secretary of the Interior (Record, p. 5).

The Railroad Company had not, at the time the said selection was made, nor has it since, selected or received land to the extent or amount granted it by the Act of July 27, 1866 (Record, p. 5).

Prior to such selection by the Southern Pacific Railroad Company of the land involved in this suit to indemnify it for the 160 acres lost within

its place limits, the United States on September 15, 1892, issued and delivered its patent conveying to the defendant in error, Isaac T. Bell, the legal title to the land involved in this suit.

After its selection of the land in question and on the 9th day of August, 1897, the Southern Pacific Railroad Company filed its complaint in this case in the Superior Court of the State of California, in and for the County of Fresno, praying that the said Isaac T. Bell should be decreed to hold the legal title to said land in trust for and to convey the same to the Southern Pacific Railroad Company (Record, p. 2).

The defendant filed a demurrer to the complaint (Record p. 6), and on the 15th of August, 1898, a judgment was entered sustaining the defendant's demurrer (Record, p. 7). From this judgment sustaining the demurrer to the complaint, an appeal was taken by the Railroad Company to the Supreme Court of the State of California and on the second day of September, 1899, the judgment of the Superior Court in and for the County of Fresno was affirmed by the Supreme Court of the State of California *upon the sole ground that the complaint did not*

state facts sufficient to constitute a cause of action (Record, p. 18).

The case was then brought here by writ of error to the Supreme Court of the State of California under the provisions of Section 709 of the Revised Statutes of the United States.

Assignment of Errors.

The Supreme Court of the State of California erred:

1. In not reversing the judgment of the Superior Court in and for the County of Fresno and in not overruling the demurrer of the defendant to the complaint herein.

2. In not holding that the Act of Congress approved July 27, 1866, entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast," granted to the plaintiff in error the land involved in this suit.

3. In not holding that the land involved in this cause was on January 3, 1867, when the map designating the line of the railroad was filed, and has ever since been withdrawn from the public domain by reason of said grant to the plaintiff

of July 27, 1866, and that at all times since January 3, 1867, the land officers of the United States have been without authority or power to release the land from said withdrawal or to dispose of it otherwise than to the plaintiff in error.

4. In not holding that the plaintiff in error became entitled to a patent from the United States for the land in controversy upon its selection thereof on July 26, 1893, and that whatever title thereto was then held by the defendant in error was held by him in trust for and under an obligation to convey the same to the plaintiff in error.

5. In not holding that the defendant in error held whatever title he had to the land in controversy by reason of the patent to him from the United States dated September 15, 1892, in trust for the plaintiff in error.

6. In not holding and adjudging that the defendant in error should convey to the plaintiff in error whatever title to the land he acquired by the patent to him from the United States dated September 15, 1892.

7. In holding that the words "hereby granted" as used in the Act of Congress approved July 27, 1866, referred to in the complaint herein, do

not include the odd sections of land within the indemnity limits of the grant.

8. In holding that the land in controversy was subject to pre-emption entry or sale after the filing by the plaintiff in error on January 3, 1867, of the map of the general route of its railroad.

9. In holding that the rights of the defendant in error in said land are based on the pre-emption laws of the United States and upon compliance therewith.

10. In holding that the selection by the plaintiff in error of said land was not made under the direction of the Secretary of the Interior.

FIRST POINT.

The Southern Pacific Railroad Company was equitably entitled to a patent for the land in question as soon as selection thereof had been made.

1.

There was a deficiency in the place limits of the grant to the plaintiff in error under the Atlantic and Pacific Act of July, 1866, and the 160 acres involved in this suit were selected by the railroad from within the indemnity limits of said grant

to make good such deficiency. Prior to such selection the United States had patented the land to the defendant in error.

The single question presented upon this writ of error is whether the land within the indemnity limits of the grant under the Act of 1866 was open to the public for pre-emption and sale after the filing of a plat designating the line of the road.

If such is the construction to be placed upon the Pacific Railroad Acts, the grant of the lands within the indemnity limits is certainly shorn of much of its supposed value and efficiency. The deficiency in the place lands cannot be determined until long after the date of the grant, and only when the line of the road has been definitely located, and the land has been surveyed. If during all this time, while the railroad is powerless to make any selection within the indemnity limits of its grant, the indemnity lands could be taken up by settlers, it would result in a serious impairment of the value of the grant and it is not clear what practical purpose there would be in making such a grant to the Railroad Company. It is to be supposed that Congress desired to give in aid of and to encourage the building of the

Southern Pacific Railroad through what was then a great stretch of desert country ten alternate sections of land per mile on each side of the road as built by it. Congress of course contemplated that very likely a considerable portion of these ten alternate sections had prior to the grant been taken up by settlers, and to ensure the certainty of the railroad getting its full amount of ten alternate sections per mile, it provided that for such land as should be already taken up and otherwise disposed of at the time of the grant, the railroad should have the right to select an equal amount from lands lying within certain other limits, commonly called indemnity limits. It would seem idle to say that Congress had given the right to the railroad to make selections from lands within certain defined but uncertain boundaries (knowing such selection must necessarily be made in the distant future) and at the same time intended that such lands should be open for settlement by the general public during all the period, when the hands of its grantee were necessarily tied, and it was prevented from making a selection therefrom. It is difficult to see how such an intention can seriously be imputed to Congress. The grant of the

indemnity limits was presumably made in good faith. That being so, it is not possible to place such a construction upon it as to virtually make it a nullity and to impute to Congress an intention to indirectly permit to be taken from its grantee what it had directly and clearly and in good faith given to it.

We quote the words of Mr. Justice BREWER in Wisconsin Central Railroad Company vs. Forsythe, 159 U. S., 46, 57, simply changing the name of the railroad and the number of the sections granted to fit the present case as follows:

> " For whose benefit was the withdrawal of the lands within the indemnity limits of the *Southern Pacific* road made? Obviously, as often declared, for the benefit of the grantee. It is as though the United States had said to the grantee: 'we do not know whether along the line of road, when you finally locate it, there will be *ten* alternate sections free from any pre-emption or other claim, and, therefore, so situated, that you may take title thereto, and so we will hold from sale or disposal to any one else an additional territory of *ten* miles on either side that within those *ten* miles you may select whatever lands may be necessary to make the full quota of *ten* sections per mile.'" (Italicised words are our own.)

The very terms of the granting act (14 U. S. Stat., 292) seem to settle the question conclusively, for by the sixth section of the act it was expressly provided that, after the general route should have been fixed, the President of the United States should cause the lands to be surveyed for forty miles in width on both sides of the entire line of the road, and that the odd sections of land granted by the act should not be liable to sale, or entry, or pre-emption before or after they were surveyed except by the railroad company as provided in the act. The full text of this section of the act is as follows:

> "SEC. 6. And be it further enacted, that the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale or entry or pre-emption, before or after they are surveyed, except by said company, as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting pre-emption rights, and the acts amendatory thereof, and of the Act entitled 'An act to secure homesteads to actual settlers on the

> public domain,' approved May twenty, eighteen hundred and sixty-two, shall be, and the same are hereby, extended to all other lands on the line of said road when surveyed, excepting those hereby granted to said company."

Now, how was it "provided in this act" that the railroad company should have the odd sections of land referred to in the foregoing section? As to the first ten odd sections within the place limits, the railroad was to have all of them which had not been previously "otherwise appropriated" at the time the line of road was designated (January 3, 1867). As to the odd sections within the additional ten miles, or the indemnity limits of the grant, the railroad was to have all of them, provided the deficiency in its place limits was equal thereto. That is to say, the railroad was to make up as far as possible losses in its place limits by selecting land from the indemnity limits. In other words, the railroad was, if possible, to have its ten sections of land whether it took them from within its place limits or by reason of deficiency within the latter was obliged to resort to the indemnity limits of its grant.

The entire grant of land by this act was not to be liable to sale or entry or pre-emption, after

the filing of the plat designating the line of road, except by the railroad, and it is not easy to see how any stronger or more apposite words could have been used by Congress to effectuate and accomplish this purpose than the ones found in the 6th Section of the act. Nothing was left to be done in the future by any officer or employee of the government. There was no direction that the Secretary of the Interior should withdraw these lands from sale or entry or pre-emption, or that any selection by the company should be approved by the Secretary of the Interior. The withdrawal of the lands was by Congress itself, and such withdrawal certainly could not be revoked by any officer of an executive department of the Government, or in any other way, unless it was by a subsequent Act of Congress.

If would therefore seem very clear that the land in question was not open to entry and pre-emption by the defendant in error, unless it is possible to say that the land within the indemnity limits of the grant to the Southern Pacific Railroad Company was not intended to fall within the provisions of Section 6 of the granting act and the entire argument of the other side comes to this one proposition, viz.: THAT THE

WORDS "HEREBY GRANTED," USED IN SAID SECTION 6, ARE LIMITED TO LANDS IN PLACE AND DO NOT INCLUDE LANDS WITHIN THE INDEMNITY LIMITS OF THE GRANT.

It is not easy to perceive the force of this argument. The source of the title of the Railroad Company to the indemnity lands as well as the place lands would seem to be the same. It acquires both classes of land under the Act of 1866. If it does not acquire its indemnity lands under this act, then what is the origin of its title thereto? If it does obtain its title to these indemnity lands by reason of the Act of Congress of 1866, then it must be that such lands are granted to the Railroad Company by such act.

As was said by Secretary Noble in the case of Chicago, St. Paul, Minneapolis and Omaha Ry. Co., IX. L. D. 465, 468:

> "Certainly, if the right to the lien lands is not conferred by the grant, it is difficult to discern whence that right is derived or how the Company can by any possibility acquire any title thereto. It cannot be obtained by selection alone, or possession, or arise out of the exigencies of the case."

It is difficult to see how the source of the title of the Railroad Company to the two classes

of lands can be otherwise than the same. We take it that the only difference is as to the manner of the perfecting such title. In the case of the place lands the title thereto was perfected by filing the map of definite location, which, in this case, was on April 13, 1889, nearly twenty-three years after the date of the granting act. In the case of the indemnity lands the title was perfected by selection, which, in the present case, took place in July, 1893, twenty-seven years after the granting act.

Our understanding is that in each case the origin of the title to the land when perfected was the Act of July, 1866; that such title was not initiated by the selection of the indemnity land any more than it was in the case of the place land by filing the map of the definite location of the road. The two steps are of a similar nature, and are but the completing, and not the initiating, of the title, which has the same source—viz., the Act of Congress of 1866.

It can hardly be said that the title to indemnity lands begins and ends with the selection thereof, for it has been held by this Court, in St. Paul & Pacific Co. vs. Northern Pacific Co., 139 U. S., 1, that selection is not even necessary when the de-

ficiency in the place limits of a grant is greater than the amount of the indemnity lands applicable thereto. As to this the Court said, at page 19:

> "As to the objection that no evidence was produced of any selection by the Secretary of the Interior from the indemnity lands to make up for the deficiencies found in the lands within the place limits, it is sufficient to observe that all the lands within the indemnity limits only made up in part for these deficiencies. There was, therefore, no occasion for the exercise of the judgment of the Secretary in selecting from them, for they were all appropriated."

It is, however, not clear that the source of the title to indemnity lands is affected in any way by whether such title is initiated by selection or not. We will concede that it is so initiated, yet such right of selection is given and created by the Act of 1866, and does not exist by reason of anything outside of such act. Such right of selection would then seem to be the source of the title to the indemnity lands, and, as such right was given by the Act of 1866, the title to the indemnity lands acquired by the exercise of such right given to the grantee thereunder must be deemed to be derived from such act and included within the term "lands hereby granted" used therein.

It is, however, unnecessary to discuss this question, for it has been decided by the Courts many times that the words "hereby granted," as used in the various Acts of Congress granting lands in aid of railroads, include lands within the indemnity limits of the grant as well as within the primary limits of such grant.

In Northern Pac. R. Co. vs. United States, 36 Fed. Rep., 282, 287, Mr. Justice BREWER, then Circuit Judge, said:

> "Again, with reference to the suggestion that the expression 'lands granted' ordinarily refer in land legislation to lands in place, the truth is that the expression has a double meaning. Its narrower one is, of course, lands in place; but it is frequently used to include all lands donated by the Government, whether lands in place or indemnity lands (Barney vs. Railroad Co., 24 Fed. Rep., 889; Railroad Co. vs. Railroad Co., 112 U. S., 730; 5 Sup. Ct. Rep., 334). Indeed, in this very resolution, the words are used in the larger sense. Thus, the proviso is, 'provided that all lands hereby granted to said company which shall not be sold or disposed of * * * at the expiration of five years, after the completion of the entire road, shall be subject to settlement and pre-emption, like all other lands, etc. Obviously this refers to all the lands which had passed to the

> company, whether lands in place or indemnity lands. Further, and in the same clause, appears the same word, 'granted,' in manifestly the same sense, so that in the very resolution the words 'granted lands' or 'lands granted' are used in the larger sense, and it naturally enforces the conviction that they were used in the same broad sense in this clause."

In Barney vs. Winona & St. P. R. Co., 24 Fed. Rep., 889, Mr. Justice BREWER construed the word "granted" as including indemnity lands as well as place lands. He said at page 892:

> " We hold that the term 'any lands which may have been granted to the territory or state of Minnesota' in the proviso of Section 3 of said act, includes all land the title to which had passed to the territory or state of Minnesota, *whether these lands were lands in place or indemnity lands*, and the word 'granted' has the broad rather than the narrow signification."

In Northern Pacific Rd. Co. vs. Barnes, 2 North Dakota Rep., 310, one of the questions involved was whether the railroad company had such a title to lands within the indemnity limits of the Northern Pacific Act of July 2, 1864 (13 Stat. at Large, 356), as would enable it to file a complaint to restrain the sale of such land for taxes. The

Court held in the affirmative, and said at page 360:

> "The indemnity lands are therefore granted equally with the place lands, or lands within the forty-mile limits, by this act. They are of the 'amount of twenty sections per mile' granted, and the words 'thereby and hereby is granted' apply to them, and pass the title. The only distinction between the two classes of land is the method by which they are identified. Once identified, the company has the same title to the one as to the other. The indemnity provision does not make an additional grant, but simply points out the method by which lands already granted may be identified."

In Chicago, etc., Ry. Co. vs. Sioux City, etc., Rd. Co., 3 McC., 280, 300, it was said:

> "The lands in place and the indemnity lands were granted by Congress for precisely the same purposes. The intention of the grantor with respect to them was exactly the same. Both were subject to the same trusts. The mode of making the title of the trustee specific was different. * * * "

In his decision of the Chicago, St. Paul, Minneapolis and Omaha Ry. Co. case, IX. L. D., 465–468, rendered on October 7, 1889, Secretary Noble, in construing the meaning of the phrases "*land hereby granted*," "embraced in the *grant*

of lands," and like phrases, as used in the congressional acts granting railroad lands, made the following interesting review:

> "But it is urged that by the use of the expression, '*grant of lands*,' Congress meant really granted lands, or lands within the primary limits of the grant. I cannot concur in this view. The history of the legislation of Congress will doubtless show many instances wherein *indemnity*, and lands other than place lands, are referred to as *granted* lands. One or two instances suggest themselves to me, and may be briefly referred to.
>
> By the ninth section of the Texas Pacific act (16 St., 576), it is provided that if, in the too near approach of said railroad to the Mexican border, the number of sections to which the company is entitled cannot be selected on the line of the road, then a like quantity of land may be selected elsewhere; 'provided that no public lands are *hereby granted* within the State of California further than twenty miles on each side of said road, except to made up deficiencies as aforesaid.'
>
> Here *indemnity lands* to be selected for other lost indemnity lands are included in the category of lands '*hereby granted*.' Also in the case of the Burlington and Missouri River grant, the only one of quantity without lateral limits now recalled, and where the land is to be obtained by *selection* anywhere along the line of the road, the

language of the act is, that (Sec. 19, Act July 2, 1864, 13 St., 356), 'there be and hereby is *granted*,' provided the company accept '*this grant*' within one year, when the Secretary 'shall *withdraw* the lands embraced in *this grant* from market.' And the Supreme Court in 98 U. S., 334, construing the act, speak of it all the way through as a '*grant*,' and of the lands as '*granted lands*,' and uphold the right of the company to select them anywhere along the general direction of the road, within lines perpendicular to it at each end. * * *

"So in 24 Fed. Rep., page 892, Barney vs. Winona, it was held that the expression 'lands which may have been *granted* to the Territory or State of Minnesota,' includes *all lands* the title to which had passed to the Territory or State of Minnesota, whether these lands were lands in place or *indemnity lands*, and the word *granted* has the broad, rather than the narrow, signification.

"So in the St. Paul vs. Winona Railroad, 112 U. S., 730, referring to the significant fact that both acts there quoted speak of additional sections 'to be *selected* a word wholly inapplicable to lands in place,' the Court says, 'we think, therefore, that these *additional lands granted* to the appellant * * * are lands to be selected,' etc.

"These citations, doubtless, might be multiplied largely, but they are sufficient, inasmuch as they show that the expressions

> '*lands granted*,' '*granted lands*,' '*lands within the grant*,' and similar expressions, have not such narrow and technical meaning as to restrict the use of them to lands in place, or within the primary limits of a grant. On the contrary, such expressions are to be construed liberally and broadly, not standing alone, but in connection with the whole context of the act, and its true meaning gathered therefrom. Therefore, on a full consideration of the subject, I am of the opinion that when Congress spoke of the failure of the Commissioner of the General Land Office to 'have the lands withdrawn from market embraced in the grant of lands,' etc., it meant the lands in both the primary and indemnity limits."

While there may, perhaps, not be in this court any such clearly-defined decision as the foregoing upon the exact question of whether the words "lands hereby granted" include indemnity lands as well as place lands, yet the case of Wood vs. Beach, 156 U. S., 548, substantially so defined such words, when it was said by Mr. Justice BREWER at page 551 in speaking of the plaintiff in the case:

> "He deliberately took the chances of *the railway company's grant*, being satisfied out of lands within the place limits or *by selections of lands within the indemnity limits*

other than this, and trusted that in such event this tract would be restored to the public domain and he gain some advantage by reason of being already on the land."

It would therefore seem clear, both on reason and on precedent that the words "land hereby granted" include the indemnity lands as well as the lands within the place limits of the grant to the Southern Pacific Railroad under the Act of 1866.

2.

Aside entirely from the very technical and extremely narrow construction of the words "lands hereby granted," which will probably be strenuously pressed by counsel for the defendant in error, the real question before the Court is: Can indemnity lands withdrawn from sale, entry or pre-emption by the act granting them to the railroad be bought or pre-empted by others before selection by the railroad company?

It would seem too obvious for argument that, as we have before pointed out, the creation by a statute of the right in the distant future to select certain lands in lieu of deficiencies in certain other lands (such deficiencies also to be deter-

mined in the future) would be an idle matter if such lands were to be open for sale to, and settlement by, the general public during the period when the original grantee was necessarily prevented from exercising his right of selection, and the question has often been decided by the Federal Courts in favor of the grantees of such right of selection; viz., the railroad companies.

It has already been held by this Court that a section in the Northern Pacific Act of 1864 (13 U. S. Stat., p. 365), which is substantially identical with the sixth section of the act in question was equivalent to a withdrawal of the lands granted to the railroad company by the Secretary of the Interior, and that any withdrawal by the Secretary was only giving publicity to what the law had already done. This was held in the case of St. Paul and Pacific vs. Northern Pacific, 139 U. S., 1, where it was said at page 17:

> "The Northern Pacific Act directed that the President should cause the lands to be surveyed forty miles in width on both sides of the entire line of the road, after the general route should be fixed, and as fast as might be required by the construction of the road, and provided that the odd sec-

tions of land granted should not be liable to sale, entry or pre-emption, before or after they were surveyed, except by the company. *They were, therefore, excepted by that legislation from grants, independently of the withdrawal by the Secretary of the Interior.* His action in formally announcing their withdrawal was only giving publicity to what the law itself declared. The object of the withdrawal was to preserve the land unincumbered until the completion and acceptance of the road."

In Buttz vs. Northern Pacific Railroad, 119 U. S., 55, it was said by Mr. Justice FIELD, at page 72:

> "When the general route of the road is thus fixed in good faith, and information thereof given to the Land Department by filing the map thereof with the Commissioner of the General Land Office, or the Secretary of the Interior, *the law withdraws from sale or preëmption the odd sections to the extent of forty miles on each side.* The object of the law in this particular is plain: it is to preserve the land for the company to which, in aid of the construction of the road, it is granted."

It is to be observed that the Northern Pacific Act and the Atlantic and Pacific Act are substantially identical in terms in respect to this

question, and that, therefore, any decision in this regard under the Northern Pacific Act is direct authority in the present case.

It may, however, be suggested that the Buttz case arose in the Territory of Dakota, and that under the Northern Pacific Act, as well as the Atlantic and Pacific Act, the railroad when it passed through a territory was given twenty odd sections per mile, that its place limits in Dakota were therefore forty miles from its roadbed, and that consequently the Buttz case had nothing to do with the question of the withdrawal of *indemnity* lands by the granting act itself.

We say in answer to this proposition that the language of the Buttz case was very evidently directed to the lands within the forty-mile belt throughout the entire length of the Northern Pacific Road, which passed through States as well as Territories, and that it was in no way limited to the particular situation in the Territory of Dakota.

A further answer to this possible argument of the counsel for the defendant in error is that the subsequent case above cited of St. Paul & Pacific vs. Northern Pacific, 139 U. S., 1, related to lands within the State of Minnesota, and that,

therefore, the doctrine of withdrawal by force of the Act of Congress, which was declared in that case related to *indemnity* lands as well as lands in place.

In the case of Southern Pacific R. Co. vs. Groeck, 68 Fed. Rep., 609, Judge Ross, in discussing the language in the Buttz case and the St. Paul case, which we have just cited, said, at page 616:

> "It does not seem to me that the language used by the Supreme Court in these cases admits of any other construction than that the odd sections included within the indemnity, as well as the primary, limits of the grant to the Northern Pacific Company, were withdrawn for the benefit of the grantee from sale, pre-emption, homestead entry or other disposition."

If, therefore, we are right in our conclusion that the land within the indemnity limits of the grant to the Southern Pacific Railroad Company was withdrawn from sale, entry or pre-emption because of the provisions of the 6th section of the Act of 1866, and that such withdrawal was at least equivalent to a withdrawal by the Secretary of the Interior, then it would seem as if the case of Wood vs. Beach, 156 U. S., 548, was a

decision directly in point and in favor of the plaintiff in error in the case at bar.

In the Wood case the facts were as follows: By the Act of July 26, 1866, entitled "An Act granting lands to the State of Kansas to aid in the construction of a Southern Branch of the Union Pacific Railway and Telegraph, from Fort Riley, Kansas, to Fort Smith, Arkansas" (14 U. S. Stat., 289), lands to the extent of five alternate sections per mile on each side of the road were granted in aid of the Union Pacific Railroad, and if it should appear at the time the road was definitely located that any of such land had been sold or otherwise appropriated, then lands within certain indemnity limits were granted in lieu of any such deficiency. By the 4th section of this act it was provided "That as soon as said Company shall file with the Secretary of the Interior maps of its line, designating the route thereof, it shall be the duty of said Secretary to withdraw from the market *the lands granted by this act*, in such manner as may be best calculated to effect the purposes of this act and subserve the public interest."

A map of the line as required by the section quoted was filed December 6, 1866, and in the

following spring orders of withdrawal were made by the Department of the Interior in pursuance of said 4th section of the act withdrawing the "lands granted" by the act. In June, 1870, Wood, the husband of the defendant, moved upon the land, which was within the indemnity limits of the grant to the railroad company, and sought to enter it as a homestead. In August, 1872, the land in question was selected and subsequently patented to the railroad company, which conveyed it to the plaintiff Beach, who brought his action to recover possession of the land in the District Court of Allen County, Kansas. Judgment was rendered in favor of the plaintiff, which judgment was affirmed by the Supreme Court of the State. The case was then brought to this Court by writ of error, where the judgment of the State Court was affirmed.

The important questions determined by this case were (1) that indemnity lands were included within the term "lands granted by this act," which are the equivalent of the words "land hereby granted," found in the section of the act now under consideration, and (2) that where there was a withdrawal of such lands (it would seem immaterial whether such withdrawal was

by the very terms of the act itself or by the order of the Secretary of the Interior), they were not subject to sale, entry or pre-emption by any one except the railroad company. In the opinion, at pages 550, 551, Mr. Justice BREWER said:

> " *These withdrawals were not merely executive acts, but the latter one at least was in obedience to the direct command of Congress.* Section 4 of the act granting lands to aid in the construction of what is now known as the Missouri, Kansas and Texas Railway Act of July 26, 1866, C. 270, §§ 4, 14, Stat. 290, is as follows:
>
> "'SEC. 4. And be it further enacted, That as soon as said company shall file with the Secretary of the Interior maps of its line, designating the route thereof, it shall be the duty of said Secretary to withdraw from the market *the lands granted by this act* in such manner as may be best calculated to effect the purposes of this act and subserve the public interest.'
>
> " The map of the line of definite location called for by this section was filed on December 6, 1866, and the withdrawal followed in the succeeding spring.
>
> " Upon these admitted facts it is clear that Mr. Wood acquired no equitable rights by his occupation and settlement. He went upon lands which were not open to homestead or pre-emption entry, and cannot make

his unauthorized occupation the foundation of an equitable title. He was not acting in ignorance, but was fully informed both as to the fact and the law. *He deliberately took the chances of the railway company's grant being satisfied out of lands within the place limits, or by selections of lands within the indemnity limits other than this*, and trusted that in such event this tract would be restored to the public domain and he gain some advantage by reason of being already on the land. But the event he hoped for never happened. The party for whose benefit the withdrawal was made complied with all the conditions of title and took the land."

The case of Northern Pacific Railroad vs. Musser-Sauntry Co., 168 U. S., 604, is an authority to the effect that a withdrawal of indemnity lands included within a railroad grant is effective as against a grant of the lands to another railroad under a subsequent Act of Congress. In the course of his decision Mr. Justice BREWER said at page 611:

"All that we here hold is, that when a withdrawal of lands within indemnity limits is made in aid of an earlier land grant and made prior to the filing of the map of definite location by a company having a later grant—the latter having such words of exception

and limitation as are found in the grant to the plaintiff—it operates to except the withdrawn lands from the scope of such later grant."

But two distinctions can be suggested between the case cited and the case at bar. (1) In the former the withdrawal of the indemnity lands was by the Department of the Interior, while in the present case it was by the terms of the granting act itself. (2) The claimant of the indemnity lands in the case referred to was a railroad company and in the case at bar an individual. We are unable to see that these two distinctions in any way affect the value of the Musser-Sauntry case as an authority in the present discussion to show that indemnity lands, after withdrawal and prior to selection by the railroad company, are not open to sale, entry or pre-emption.

As we understand the decision in the case of The United States vs. Colton Marble and Lime Co., 146 U. S., 615, it is an authority to the effect that the indemnity lands granted by the Act of 1866 (the act involved in this case) are not open to entry, sale or pre-emption after the filing of the map of the general route of the grantee except to such grantee. It appeared in this case

that the indemnity lands granted to the Atlantic and Pacific Railroad by the Act of 1866 fell within the place limits of the Branch-Line Grant to the Southern Pacific Railroad Company under the Texas Pacific Act of 1871. It was held, however, by this Court, that, although at the time of the grant to the Southern Pacific Company the Atlantic and Pacific had made no selection of its indemnity lands, yet to allow them to be taken under the place land grant to the Southern Pacific Company would interfere with the right of selection given to the Atlantic and Pacific by the grant to it under the Act of 1866. Judge BREWER said, at page 617:

> "It might well be assumed that very likely the Atlantic and Pacific Company would be called upon to select from the indemnity lands a portion sufficient to make good the deficiency, in the granted limits. *That right of selection was a prospective right, and, if it was to be fully exercised, no adverse title could be created to any lands within the indemnity limits.*"

We fail to see the difference between a grant to a railroad company of land within the indemnity limits of a prior railroad grant and a grant to an individual of land within such indemnity

limits. If in the former case it cannot be done, as was held by Judge BREWER in the Colton case, it would seem as if the same rule must apply when the subsequent grantee is an individual and not a railroad company.

An examination of the record in this Court of the case of St. Paul & Pacific vs. Northern Pacific, 139 U. S., 1, shows that a large part of the land involved therein was within the *indemnity* limits of the grant to the Northern Pacific Railroad. One of the questions in the case was whether the subsequent grant to the St. Paul and Pacific Railroad of lands within the indemnity limits of the prior Northern Pacific grant gave the St. Paul Company a valid title thereto as against the Northern Pacific Company. It is to be noticed that the very same question was presented as appears in the case at bar, except that the subsequent grantee is here an individual, while in the Northern Pacific case it was another railroad. It was held by this Court that the indemnity lands of the Northern Pacific grant were withdrawn from the operation of any grant to another railroad company by the terms of the Northern Pacific Act (which is in substance identical with the Atlantic and Pacific Act). The

Court said, at page 9, speaking through Mr. Justice FIELD:

> "The right of the plaintiff, the Northern Pacific Railroad Company, to the lands in place along the line of its route as definitely located in the State of Minnesota, and to other lands, to make up deficiencies within those limits, caused by previous grants, sales, reservations, settlements or pre-emptions, *to be taken from the indemnity limits*, * * * will not admit of serious doubt, unless a prior right attached to those lands by an earlier grant of the United States. * * * The Northern Pacific Act directed that the President should cause the lands to be surveyed forty miles in width on both sides of the entire line of the road, after the general route should be fixed, and as fast as might be required by the construction of the road, and provided that the odd sections of lands granted should not be liable to sale, entry or pre-emption before or after they were surveyed, except by the company. They were therefore excepted by that legislation from grants, independently of the withdrawal by the Secretary of the Interior. His action in formally announcing their withdrawal was only giving publicity to what the law itself declared. *The object of the withdrawal was to preserve the land unencumbered until the completion and acceptance of the road.* * * *

> "After such withdrawal, no interest in the lands granted can be acquired against the rights of the company except by special legislative declaration, nor, indeed, in the absence of its announcement, after the general route is fixed."

The question involved in the present case has been often before the lower Federal Courts in one form or another, and has almost uniformly been decided in favor of the railroad. One of the earliest cases is Southern Pacific R. Co. vs. Wiggs, 43 Fed. Rep., 333, which involved the very same grant now before this Court and in which the facts were as follows: The land in question was within the *indemnity* limits of the Southern Pacific *Main* Line Grant and had been withdrawn from sale, entry or pre-emption at the time the respondent Wiggs filed his pre-emption claim on May 19, 1881, claiming a settlement thereon on May 15, 1868, more than a year after the railroad company filed its map of general route. Wiggs made final proofs of his pre-emption on February 19, 1884, and received a patent for the land on June 12, 1885.

On July 9, 1885, the Southern Pacific Railroad Company selected the land in controversy to make good a deficiency within the place limits of

its grant, but the selection was rejected for the single reason that, as appeared by the records of the Land Office, the land was already patented to Wiggs.

The Southern Pacific Railroad Company thereupon filed its bill in the United States Circuit Court for the Northern District of California seeking a decree declaring void and annulling the patent granted by the United States to Wiggs. The prayer of the bill was granted and the patent set aside. Judge SAWYER, in his opinion said, at page 335:

> "In this case, the right to select, in the future, this land, in the part limited for that purpose, vested, should there turn out to be a deficiency, on filing the map of definite location, thereby fixing the limit of the district for selection, although no title to the land vested till selection. The precise question now involved is not, so far as I am aware, presented in any other case. The statute itself makes a specific grant of every alternate section within certain specified limits, to which no other right has attached at the time when the line of the road becomes definitely fixed; and, in case some of the lands are lost by reason of prior interests having attached, it gives a right to select an amount equal to that so lost out of

any odd sections of public lands free from other prior claims within other specified limits of no great extent. The right to select at once vests, though the title to specific lands does not till selection is made; and, to preserve that right of selection, the statute itself, in terms, provides, that said odd sections shall not be liable to sale, or entry, or pre-emption, other than to the Company; that no pre-emption right shall be allowed in those lands specified."

After citing the sections of the act now before the Court in the present case, Judge SAWYER went on to say, at page 336:

"Thus, in express terms, it is provided, that the odd sections thus granted within the whole boundaries shall not be subject to sale, entry or pre-emption before, or after, they are surveyed, except by said Company, as provided in this act. It is apparent that Congress intended to preserve all these odd sections, within the space limited, till it could be ascertained what deficiency there would be; and the Company could supply them by selections within the prescribed limits. It permitted sales and pre-emptions, within the prescribed limits, of even sections only. Congress intended that the grants should be substantial. This case affords an illustration of the injustice of any other view. This map of definite location was

filed on January 3, 1867, whereby the limits became fixed, and the right of selection, upon the arising of the conditions, vested. The Government did not file its plat of the survey till March 17, 1881, fourteen years afterwards, and long after the completion of the road opposite the lands. Until this time it could not be ascertained whether any, or, if any, what, deficiency would exist; and, if it could be known, there could be no selection of odd sections to supply the deficiency until it could be known where the odd sections would fall, and this would require a survey. But if during all this time the lands were open to pre-emption the lands could all be taken up while the hands of the complainant were tied. In this very case the respondent initiated his pre-emption claim by settlement in 1868, but did not, because he could not, file his declaratory statement till a short time after the filing of the plat in 1881, immediately after which the contest between him and the Company, as to which had the right, commenced before the Department, and it was followed up till finally decided, a short time before the patent issued. If one pre-emptor can enter upon the land wanted, and wait ten years or more for a survey, and thereby acquire a right, while the Railroad Company must wait for a survey before it can make its selection and acquire a right thereby, all

the lands can be in that manner wrested from the Company; and of what use to it, under such conditions, would be the right to select given by the statute?

"If such a right of pre-emption exists, while the Company cannot act, all the lands which derive their greatest value from the very construction of the road, or its contemplated construction, could be wrested from the Company, even after the road is constructed, by a failure of the Government to make the survey.

"Manifestly, I think, Congress intended to withdraw from sale, entry or pre-emption, by parties other than the Company, all those lands set apart within fixed limits, as well those authorized to be selected as lieu lands, and thereby preserve the right of selection, till selection was possible to be made, as those absolutely granted in which the title itself presently vested. No time was limited by the act for selection, or limitation of time put upon the express withdrawal, either by the act or the Secretary of the Interior. A right to select which could be cut of at the sole discretion of any pre-emptioner without any fault of the Company, and without any power on its part to prevent it, would be illusory, and no right at all. By the statute the President was required to 'cause the lands to be surveyed for forty miles in width'—the whole forty miles. And the odd sections grantedwithin the

whole forty miles 'shall not be liable to sale, entry or pre-emption before or after they are surveyed, except by said Company, as provided in this act.' It does not appear to me that this language is susceptible of more than one construction, and that is that no pre-emption right could be perfected or initiated in the face of that prohibition, till Congress sees fit to withdraw it, while still in its power to do so, or till the whole claim of the Company for deficiency is both ascertained and satisfied. As Congress did not see fit to put any limitation upon the time for selection, neither the Secretary of the Interior nor the courts are authorized to prescribe such limitation."

The same question was again raised in the case of Southern Pac. R. Co. vs. Araiza, 57 Fed. Rep., 98, and again decided in favor of the railroad company by Judge Ross, then United States District Judge of the Southern District of California, who, in the course of his opinion, pointed out that the Act of 1866 withdrew the indemnity lands from sale, etc., without regard to any act of withdrawal by the Department of the Interior. As to this it was said at page 104:

"The language of the sixth section of the two acts being in substance, and almost literally, the same, the language of the Supreme

Court above quoted is equally applicable to the act in question here. If, as there held, the law itself withdraws from sale or pre-emption the odd sections to the extent of forty miles on each side of the road represented by the map of general route, manifestly it withdraws from sale or pre-emption the odd sections within the limits named in the grant on each side of the line of road as fixed by the map of definite location. Such being the true construction of the statute itself, as thus declared by the Supreme Court, it would seem to result necessarily that all of the odd sections within the indemnity as well as the primary limits of the grant contained in the Act of July 27, 1866, were withdrawn from sale or pre-emption, without regard to the order of withdrawal promulgated by the Secretary of the Interior through the Commissioner of the General Land Office, and consequently they were not open to entry or settlement at the time of the defendant's entry and settlement thereon; for, as has been seen, the Court declares that the law itself worked that result."

The case of Southern Pacific Railroad Company vs. Groeck, 87 Fed. Rep., 970, presented substantially the same question as arises in this case. The lands involved were within the indemnity limits of the Main-Line Grant to the

Southern Pacific Railroad Company, and, as was held by the Circuit Court of Appeals, had been withdrawn from settlement by the terms of the Act of July 27, 1866. The defendant, Groeck, settled upon the land in September, 1885, complied with the Land Office regulations and made pre-emption proof and payment for the land. On April 11, 1890, a patent was issued by the United States conveying the land to Groeck.

On the 2d of April, 1889, a map of the definite location of the section of the railroad between Huron and Alcalde was filed with and approved by the Secretary of the Interior, and the President of the United States accepted and approved the Commissioner's report on such section of the railroad on November 8, 1889. In July, 1891, the railroad company, acting under the direction of the Secretary of the Interior, selected the land in suit as granted by the Act of 1866 and filed a bill in the United States Circuit Court for the Southern District of California seeking to obtain a decree that Groeck held in trust for it the patent for the land which he had obtained from the United States. The decision of the Circuit Court was in favor of the railroad company upon the question now before

this Court, but against it on the question of laches, an entirely immaterial question so far as this case is concerned. The Circuit Court of Appeals, however, determined the whole case in favor of the railroad company, and held that the lands within the indemnity limits of the Southern Pacific Main-Line Grant were not open to pre-emption after the filing of the map of general route in January, 1867, but were by the terms of the Act of July, 1866, withdrawn from settlement, except by the railroad company. In the course of the decision it was said at page 972:

> "A careful consideration of other decisions of the Supreme Court determining the nature of the right which the grantee of such a grant acquires to lands within the indemnity limits, prior to the time when definite location and selection of lieu lands is made, leads us to the conclusion that, in the case of a grant such as that now under consideration, by the operation of the terms of the grant itself the indemnity lands are withdrawn from settlement from the moment when a map of the general route of the road is made and filed. It may be deduced from those decisions that the grant to the appellant conferred upon the grantee, within the indemnity limits, more than the mere right to initiate a title by selection,

and that the lands within the indemnity limits are as truly granted lands, within the terms of the act, as are the lands within the place limits. The difference is in the preliminary steps which are requisite to attach the title to the particular tracts which are granted."

(It is perhaps proper to state that an appeal on the part of the Government is pending in this court from the final decree in the case just cited.)

Keeping in view the fact that Congress passed the Act of 1866 for the purpose of giving to the plaintiff in error its full amount of ten sections of land per mile, and remembering that "it is always to be borne in mind in construing a Congressional grant that the act by which it is made is a law as well as a conveyance, and that such effect must be given to it as will carry out the intent of Congress," and that "That intent should not be defeated by applying to the grant the rules of the common law, which are properly applicable only to transfers between private parties" (Missouri, K. & T. Ry. Co. vs. Kansas Pacific Ry. Co., 97 U. S., 491, 497), we respectfully submit that the foregoing review of authorities would seem to necessarily lead to the conclusion that the

indemnity lands of the Southern Pacific Railroad Company were withdrawn from sale, entry or pre-emption by the 6th section of the Act of 1866 as soon as the map designating the line of road was filed, January 3, 1867, and were not open to sale by the United States to the defendant in error after such withdrawal and prior to selection by the plaintiff in error, and that the defendant in error holds whatever title he may have acquired by reason of the patent to him from the United States, of September 15, 1892, in trust for the Southern Pacific Railroad Company.

SECOND POINT.

The judgment of the court below should be reversed.

L. E. PAYSON,
MAXWELL EVARTS,
Of Counsel for Plaintiff in Error.

No. 158. 90.

Brf. of Call for D. C.

FILED
DEC 17 1900
JAMES H. MCKENNEY
Clerk.

Filed Dec. 17, 1900.

SUPREME COURT

OF THE

United States.

OCTOBER TERM 1900

No. 158

The Southern Pacific Railroad Company,
Plaintiff in Error,
vs.
Isaac T. Bell,

Error to the Supreme Court of the State of California.

BRIEF FOR DEFENDANT IN ERROR.

By JOSEPH H. CALL.

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Statement.

On August 9, 1897, the Southern Pacific Railroad Company filed its complaint in the Superior Court of Fresno county, California, against Isaac T. Bell, by which it sought a decree adjudging it to be the owner of the northeast quarter of section seven, township seventeen south, range sixteen east, Mount Diablo Meridian, and that it be adjudged that the defendant holds the legal title of said land in trust for the plaint-

iff, and requiring him to convey the same to the plaintiff. (Record 2–6.)

The plaintiff claimed title to this land by virtue of section 18 of the Act of Congress of July 27, 1866, (14 Stat. 292) and amendments of that act, as land granted to it to aid in the construction of a railroad from the bay of San Francisco, to an intersection with the Atlantic & Pacific Railroad.

The complaint shows that the tract of land sued for is outside of the granted limits of the grant to that company, and more than twenty miles from its line of road, but within the indemnity limits of the grant. (Record 4.)

From the allegations of the complaint it appears that on September 15, 1892, the United States issued a patent in due form of law to defendent Bell for this land, presumably under the settlement laws, in as much as cash entries of land were not then permissible. (Record 5.) And it further appears that nearly a year *thereafter*, and on July 26, 1893, the Southern Pacific Company first made application to the Interior Department to select this land as indemnity (Record 5), and at which time the full legal title to the land had passed out of the United States and to defendant Bell.

To this complaint the defendant demurred, under the California Code, upon the ground, among others, "that said complaint did not state facts sufficient to constitute a cause of action." (Record 6.)

The demurrer having been sustained and the plaintiff having neglected and refused to amend the com-

plaint, final judgment was entered against the plaintiff and in favor of the defendant. (Record 6, 7.)

Upon appeal by the plaintiff to the Supreme Court of California the judgment of the Superior Court of Fresno county was affirmed, upon the authority of Southern Pacific Company v. Wood, 124 Cal. 475, 481 (57 Pac. Rep. 388) (Record 8-18.)

The Supreme Court of California unanimously reached the conclusion that no title or right could attach in the railroad company to indemnity land until it had been selected and such selection *approved by the Secretary of the Interior*, and until so selected the Land Department could properly and lawfully issue a patent to another, which would defeat such right of selection by the company, relying upon the decisions of this court in Wisconsin Central Railroad Company vs. Price County, 133 U. S. 496, and numerous other cases cited in the opinion.

The Supreme Court of California has so fully gone into the whole question and has reviewed the authorities with such ability and thoroughness that little can be added to support the conclusion reached by the court.

The essential facts, succinctly stated, are as follows:

1. The grant to the Southern Pacific Railroad Company, by section 18 of the Act of Congress of July 27, 1866, (14 Stat. 292), was of the public lands, not reserved, designated by alternate odd numbered sections for twenty miles on each side of the line of railroad, with a right to *select* indemnity *under the direction of the Secretary of the Interior* from the alternate sections of public land within a further limit of ten miles upon

each side, in lieu of losses within the place limits, of lands granted, reserved, sold, etc., prior to definite location. Section 6 of this act required the company to file a map of general route, and section 3 of the act required the company to file a map of definite location, as has been heretofore decided.

United States v. Southern Pacific, 146 U. S. 570, 597, 599.

Southern Pacific v. United States, 168 U. S. 1, 42.

The Southern Pacific Railroad Company, organized under the laws of California, at the time of the passage of this act, was authorized by its charter or articles to construct only a line of railroad *from the Bay of San Francisco, through the county of Los Angeles to the town of San Diego, and thence easterly to the Colorado river*, which fact appears from numerous decisions of the Secretary of the Interior in construing the acts of congress relating to the Southern Pacific Railroad Company, and in determining the purpose and object sought in subsequent legislation, as appears from the following decisions of the Secretaries of the Interior in Southern Pacific grant cases.

Secretary's letter of March 19, 1867;

Secretary's letter of November 2, 1869;

Secretary's letter of November 11, 1869;

Secretary's letter of May 9, 1873;

and the case of Southern Pacific Railroad, 25 Land Decisions, 223, 229.

As instructive upon this question, see also,

Southern Pacific Railroad v. United States, 98 Fed. Rep. 27, 39 (C. C. A.).

On *January 3, 1867*, the Southern Pacific filed in the Interior Department a map of its *general route* (Record 3), *showing the line of road from San Francisco down the San Joaquin valley to Mojave, and thence east to the Colorado river at Needles*, upon which a temporary withdrawal was made of the public lands within the thirty-mile limits, *but this withdrawal was set aside by subsequent orders of the Secretaries of the Interior, upon the ground that the grant by congress was to aid in the construction of a railroad upon the line described in the charter or articles of incorporation of the Southern Pacific Company, which was a line from San Francisco, through Los Angeles county to San Diego, and thence east, and not a line from San Francisco to Mojave, and thence east to Needles*, as appears from the various decisions of Secretaries of the Interior in their letters and decisions above referred to.

Thereupon further legislation was procured from the legislature of California, by the Southern Pacific by the Act of April 4, 1870, under which that company was authorized to amend its articles of incorporation and change the line of its road, so as to reach the *eastern* boundary of the state of California.

On June 28, 1870, the Southern Pacific Company procured the passage of the joint resolution of Congress of June 28, 1870, (16 Stat. 382) authorizing the company to construct its line of railroad "*as near as may be* on the route indicated by the map filed by said company in the Department of the Interior on the 3rd day of January, 1867", and granted to the company, to aid in such construction, the same amount of lands, and upon the

same terms and conditions, as had been granted by the Act of July 27, 1866.

This act of the California legislature and joint resolution of Congress of June 28, 1870, have been considered by the Court and the purposes of the act commented upon, in Southern Pacific Railroad Company v. United States, 168 U. S. 1, 27, 28.

The importance of this amendatory legislation by the legislature of California and by Congress, in enabling the Southern Pacific Company to construct its railroad *down the San Joaquin Valley to Mojave*, and thence east to Needles, becomes apparent, in view of the contention now made by the company that the purpose of the joint resolution of June 28, 1870, was to adopt the map of general route or preliminary location filed in 1867, upon that line of route, as a final and definite location by the company, upon which, as is claimed, the grant of lands attached at that time, and claiming that the purpose was not, as decided in numerous cases in the Interior Department above mentioned, and as shown by the legislation itself, to authorize the Southern Pacific Company to build a line of railroad upon a totally different route from that intended to be constructed in the original Act of July 27, 1866.

The Southern Pacific Company proceeded to construct the line of railroad authorized by the joint resolution of 1870, and actually completed that part of it from San Francisco to Tres Pinos, and from Alcalde to the Needles (Record 3), but never did complete or construct that part of the line of railroad between Tres Pinos and Alcalde (Record 3).

Southern Pacific Railroad, 25 L. D. 223, 229.

As the line of road of the Southern Pacific was definitely located and constructed, sectional maps of such definite location were filed in the Interior Department, and that section opposite to the land in suit was filed on or prior to November 8, 1889. (Record 3.)

On August 15, 1887, the Secretary of the Interior, after due notice to the company, revoked the order of withdrawal theretofore made of indemnity lands along the line of the Southern Pacific, and restored them to the public domain.

Atlantic & Pacific Railroad Case, 6 L. D. 84, 92, 93.

On September 15th, 1892, the United States patented this land to defendant Isaac T. Bell. (Record 5).

On July 26, 1893, the Southern Pacific Company made application to select the land as indemnity.

POINTS AND AUTHORITIES.

First.

The Act of Congress of July 27, 1866, as Amended by the Joint Resolution of June 28, 1870, Required of the Southern Pacific, Not Only a Map of General Route but one of Definite Location.

This court, in construing the act of July 27, 1866, has decided that section 6 of the act required a map of general route and that section 3 required a map of *definite location.*

United States v. Southern Pacific, 146 U. S. 570, 597, 599;

Southern Pacific v. United States, 168 U. S. 1, 42.

The court will take judicial notice of the decisions and orders of the Secretary of the Interior, of record in the Interior Department.

Heath v. Wallace, 138 U. S. 573, 587;
Jones v. United States, 137 U. S. 202;
Caha v. United States, 152 U. S. 211.

It is especially important that such judicial notice should be taken of the records of the Interior Department in a case like the present, which involves the construction of the joint resolution of congress of June 28, 1870, in order to determine what situation was presented in the Interior Department at that time which called for such legislation.

From the decision of the Interior Department, before referred, it appears that the purpose of that joint resolution was to authorize the Southern Pacific Company to construct a line of railroad from San Francisco, via Mojave to the Needles on the Colorado river, upon the *general route* described and shown by the map filed in the Interior Department on January 3, 1867, and that the grant was subject to all the terms and conditions which were prescribed by the act of July 27, 1866, one of which was to file a map of general route, another to file a map of definite location, and yet another to select such indemnity lands as it might be entitled to, under direction of the Secretary of the Interior.

It is obvious from the situation presented in 1870 and in view of the attempt of the Southern Pacific Company to secure a land grant upon a line not authorized by its charter or by the act of Congress, and which had been rejected by the Interior Department, that the

purpose in that joint resolution was not to dispense with the filing of a map of general route or of definite location, or to confirm to the Southern Pacific as a map of *definite location* the map of preliminary route which it had tendered in 1867, but was a *new grant* upon a *different route.*

In considering this very question the United States Circuit Court of Appeals for the Ninth Circuit, in United States v. Southern Pacific Railroad Company, 98 Fed. Rep. 27, 39, said:

"The Southern Pacific Railroad Company referred to in that section [Sec. 18 Act of July 27, 1886] was at that time authorized by its charter to build a railroad from San Francisco, through the counties of Santa Clara, Monterey, San Luis Obispo, Tulare, Los Angeles, and San Diego, to the town of San Diego, and thence eastward through the county of San Diego to the eastern line of the state; but that is a very different line of road from the one down the San Joaquin Valley, through the Tehachapi Pass, to Mojave, and thence eastward to the Needles, on the Colorado river, the authority for the building of which under its charter, wasnot obtained from the legislature of the state until April 4, 1870, and was not authorized by congress until June 28, 1870; and then the resolution of congress granting the the authority expressly provided for the saving and reserving of all the rights of actual settlers, together with the other conditions and resolutions provided for in the third section of the act of July 27, 1866."

It is settled by the decisions of this court that the route laid down in the charter or articles of incorporation of a railroad company is deemed to be read into the congressional act making a grant of lands or of right of way to the company, and it is presumed that congress had such line of route in view.

Railway Company v. Alling, 99 U. S., at page 474.

Washington Railroad v. Coeur d'Alene Railway, 160 U. S. 77, at page 99.

The general route of the Atlantic & Pacific Railroad, fixed in section 1 of the Act of July, 27, 1866, was upon or about the 35th parallel of north latitude, at the crossing of the Colorado, but in fact the line of road was definitely fixed to reach the Pacific Ocean at San Buenaventura, (United States v. Southern Pacific, 146 U. S. 570; Southern Pacific v. United States, 168 U. S. 1) and at that point the Southern Pacific would have intersected the Atlantic & Pacific Railroad upon the western boundary of the state, and upon the line fixed in its charter. The land grant attempted to be seized by that company, by way of Mojave to Needles was more than two hundred and fifty miles further in length than would have been, to have made the intersection at San Buenaventura, and of course it is a well settled principle that where the *termini* of a land grant road are fixed that the road must be constructed upon the shortest practicable route.

St. Paul R. v. Northern R., 139 U. S. 1; U. S. v. Northern R., 152 U. S. 284, 292.

For all these reasons it is obvious that the state and congressional legislation of 1870 conferred the first authority to construct by way of Mojave to Needles, and that the grant of lands along that line was a new and distinct one, and to aid in the construction of a wholly different line from that contemplated by the act of 1866, as decided by the Circuit Court of Appeals and by the Interior Department.

SECOND.

In Filing its Map of General Route on January 3, 1867, and Securing a Temporary Reservation at that Time, the Southern Pacific did not Acquire, by Virtue Thereof, any Right or Title to any Lands Along the Line.

New Orleans Railroad v. Parker, 143 U. S. 42, 57, 58;

United States v. Southern Pacific, 146 U. S. 570, 599, 600;

Southern Pacific v. United States, 168 U. S. 1, 41, 42;

United States v. Oregon Railroad, 176 U. S. 28.

The act of Congress, under which the Southern Pacific claims title, does not provide that any title or right shall vest in the company prior to definite location of the road, but fixes the time of filing that map as the time when its grant to lands in place shall attach, and requires the company to *select* indemnity lands to which it may be entitled, under the direction of the Secretary of Interior.

In requiring the company to file a map of general route by section 6 of the act, there is no provision whatever for the withdrawal of the lands within the indemnity limits, and certainly no provision granting any title prior to definite location.

Obviously the requirement that the company should file a map of general route was not wholly for the benefit of the company, but to protect the public as well, and to inform the Land Department of the general route of the road, prior to definite location. Even if this section had required a withdrawal of lands that would not pass title to the company, in view of the express

requirement of section 3 of the act that the company should file a map of definite location and that title should pass only at that time.

THIRD.

Until Selection of Indemnity Land has been Made by the Company, Approved by the Secretary of the Interior, no Right or Title Passes to the Company.

Wisconsin Central Railroad v. Price County, 133 U. S. 496, 511, 512;

Ryan v. Railroad Company, 99 U. S. 382, p. 386;

St. Paul Railroad v. Winona Railroad, 112 U. S. 720, p. 731.

Sioux City Railroad v. Chicago Railroad, 117 U. S. 406, p. 408;

Barney v. Winona Railroad, 117 U. S. 228, p. 232;

Cedar Rapids Railroad v. Herring, 110 U. S. 27, pp. 41, 42;

United States v. Missouri Railroad, 141, U. S. 358, p. 374;

New Orleans Railroad v. Parker, 143 U. S. 42, pp. 57, 58;

Southern Pacific Railroad v. Wood, 124 Cal. 475, 481;

Moore v. Carmode (S. C. Wash.), 55 Pac. Rep. 217.

The settled doctrine of the court upon this question which was applied in Wisconsin Railroad v. Price county, *supra*, 133 U. S. 496, 511, 512, is there expressed by the court in the following language:

"But as to the remainder of the lands taxed, which fell within the indemnity limits, the case is different. For such lands no title could pass to the company not only until the selections were made by the agents of the state appointed by the governor, but until such selections were approved by the Secretary of the Interior. The agent of the state made the selections, and they had been properly authenticated and forwarded to the Secretary of the Interior. But that officer never approved of them. Nor can such approval be inferred from his not formally rejecting them. * * * The approval of the secretary was essential to the efficacy of the selections, and to give to the company any title to the lands selected. His action in that matter was not ministerial but judicial. He was required to determine in the first place, whether there were any deficiencies in the land granted to the company which were to be supplied from indemnity lands, and in the second place, whether the particular indemnity lands selected could be properly taken for those deficiencies. In order to reach a proper conclusion on these two questions, he had also to inquire and determine whether any lands in the place limits had been previously disposed of by the government, or whether any preemption or homestead rights had attached before the line of the road was definitely fixed. There could be no indemnity unless a loss was established. and in determining whether a particular selection could be taken as indemnity for the losses sustained, he was obliged to inquire into the condition of those indemnity lands, and determine whether or not any portion of them had been appropriated for any other purpose, and if so what portion had been thus appropriated, and what portion still remained. This action of the secretary was required, not merely as supervisory of the action of the agent of the State, but for the protection of the United States against an improper appropriation of their lands. Until the selections were approved there were no selections in fact, only preliminary proceedings taken for that purpose; and the indemnity lands remained unaffected in their title. Until then the lands which might be taken as

indemnity were incapable of identification; the proposed selections remained the property of the United States."

In harmony with these decisions of the court is a long line of decisions of the Interior Department, running through a series of many years, uniformly holding that no right or title to any particular tract of indemnity land passes until it has been selected and approved, and until which time the land is open to disposal by the Land Department.

Brady v. S. P. R. R. Co., 5 L. D. 658;
Secretary Lamar to President, 6 L. D. 77;
Atlantic and Pacific R. R. Co., 6 L. D. 84, 85;
N. P. R. R. Co. v. Miller, 7 L. D. 100;
S. P. R. R. Co. v. Meyer, 9 L. D. 250;
N. P. R. R. Co. v. Walters 13 L. D. 230.
S. P. R. R. Co. v. Wasgatt, 13 L. D. 145;
S. P. R. R. Co. v. McWharter, 14 L. D. 610;
S. P. R. R. Co. v. Waters, 17 L. D. 270;
S. P. R. R. Co. 18 L. D. 314;
S. P. R. R. Co. v. McMahon, 21 L. D. 402;
N. P. R. R. Co. v. Lillethun, 21 L. D. 487,
S. P. R. R. Co. v. McKinley, 22 L. D. 493;
S. P. R. R. Co. v. Kanawyer, 23 L. D. 500;
N. P. R. R. Co. v. Ayers, 24 L. D. 40;
S. P. R. R. Co. (joint resolution of 1870) 25 L. D. 223;
S. P. R. R. Co. v. Davis, 26 L. D. 595;
N. P. R. R. Co. v. Gunther, 26 L. D. 340;
Lund v. N. P. R. R. Co., 27 L. D. 348;
N. P. R. R. Co. v. Blain, 27 L. D. 361;
State of California v. S. P. R. R. Co., 27 L. D. 542;

Upon well settled principles this uniform construction of these laws by the Interior Department should not be overturned, unless clearly wrong.

FOURTH.

When the Selection has Been Approved by the Secretary of the Interior the Equitable Title Passes to the Company, but Only When Patent is Issued, Under the Provisions of Section Four of the Act of July 27, 1866, Does the Full Legal Title Pass, and Until Patented the Land is Within the Control of the Interior Department.

It is required by the act of July 27, 1866, (Section 4) as well as by the amendatory act or resolution of June, 28, 1870, that the title to lands earned by the company shall pass by the issuance of a patent.

The patent of the United States is the solemn instrument provided by law as complete evidence of the performance of all conditions by the patentee, and as a determination of all *facts* favorable to the patentee which are required to be established as antecedent to its issuance and is full and complete evidence of the passing of the legal title.

It is the settled doctrine in the disposal of the public lands that where a patent is required or contemplated the legal title and control of the land can not pass from the Land Department without its issuance, as there are many questions of fact to be determined by the Land Department, which has exclusive jurisdiction of such matters, and many matters of discretion are involved.

In Barden v. Northern Pacific Railroad, 154 U. S. 288, 327, the Court said:

"It is the established doctrine, expressed in numerous decisions of this court, that wherever Congress has provided for the disposition of any portion of the public lands of a particular character, and authorizes the officers of the Land Department to issue a patent for such land upon ascertainment of certain facts, that department has jurisdection to inquire into and determine as to the existence of such facts, and in the absence of fraud, imposition, or mistake, its determination is conclusive against collateral attack"

And in applying the principle, the court held that the determination as to the mineral character of lands was vested exclusively in the Land Department.

In Wisconsin Railroad vs. Price County, 133 U. S. 496, it was distinctly decided, upon a full review of the authorities, that in the matter of the selection of railroad indemnity lands there were antecedent facts to be determined by the Land Department and judicial discretion to be exercised by the Secretary of Interior, and, it is necessary for the Land Department to determine whether such a loss has been made in place limits as authorized the selection of indemnity, whether the land sought to be selected is open to be taken as such indemnity, and whether it is of the character of land which the company might select, and it might be added that it must be determined whether the applications to select are in due form, whether the land is mineral land, swamp land, coal land, or whether it is otherwise public agricultural land subject to selection. These, as well as numerous other antecedent questions must be determined by some tribunal, and if not by the Interior

Department, then by whom? It can not be possible that these questions can be determined by the railroad company in its own favor, and its judgment enforced by legal proceedings in the courts.

In Michigan Land Company v. Rust, 168 U. S. 589, 592, it was adjudged that under the swamp land act of 1850, which provided for a listing of the land, to be approved by the Interior Department, and a patent in due form of law, that even after the land had been listed and certified, that the Interior Department had the power to review the proceedings, cancel the listing and patent the land to another under a later entry.

In Brown v. Hitchcock, 173 U. S. 473, which also arose under the swamp land act, it was held that the legal title did not pass until patent issued, and that all questions of fact and proceedings were open to review and reconsideration in the Interior Department, prior to issuance of patent.

In Rogers Locomotive Works v. American Emigrant Company, 164 U. S. 559, 574, it was adjudged that lands claimed under the swamp land grant of 1850, which were included in a list certified to the state under a railroad grant, that such certification was a conclusive determination by the Interior Department of the non-swamp character of the land.

In the very recent case of Hawley v. Diller, 178 U. S. decided May 28, 1900, it was held that even after entry and final proof of a tract of land under the timber and stone act, that the Land Department had the power to cancel the entry and issue a patent to another under a different entry.

From these authorities it can not be reasonably doubted that the Land Department is a special tribunal clothed at least with quasi-judical powers, having exclusive jurisdiction and control of the public lands, and that its determination of all questions of fact is conclusive, and that it may exercise wide discretion as to other matters preliminary to the issuance of patent.

Such being the law, it is submitted that until the selection of the Southern Pacific had been approved prior to a disposal of this land for other purposes or to another, that no right or title was vested in the company, and that when so approved, equitable title would pass, subject to be cancelled or annulled by the Interior Department, upon reasonable or proper grounds, and that only when patent issues can the company acquire a full legal title.

As this tract of land was patented to defendant Bell long before the company even applied to select the land, it is submitted that no right or title is vested in the company.

FIFTH.

The Facts Found by the Land Department Upon the Issuance of the Patent to Defendant Bell are Conclusive Against the Southern Pacific

Authorities *supra*.

Also,

Steel v. Smelting Company, 106 U. S. 447, 457;

Lee v. Johnson, 116 U. S. 48;

Heath v. Wallace, 138 U. S. 573, 585;

United States v. Marshal Company, 129 U. S. 579, 588;

Russell v. Maxwell Land Grant Company, 158 U. S. 253;

In conclusion, it is submitted that the judgment of the Supreme Court of California should be affirmed.

JOSEPH H. CALL,
Counsel for Defendant in Error.

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1901.

SUPREME COURT

OF THE

UNITED STATES.

Southern Pacific Railroad Company,
Plaintiff in Error,

vs.

Isaac T. Bell,
Defendant in Error.

Additional Brief for Defendant in Error.

The Controlling Principle in this Case, Namely, that there was no Authority to Withdraw the Indemnity Lands, as Against Homestead and Pre-emption Entries, and that Patents Issued to Settlers Under Such Entries are Valid, has been Lately Presented and Fully Determined by the Court Adversely to the Contentions of the Plaintiff in Error in the Present Case.

In the following cases, fully argued, submitted and determined, and opinions filed on January 7, 1901, it was decided by the court in construing the grant to the Northern Pacific Railroad Company [Act of Congress, July 2, 1864, 13 Stat. at L. 365, chapter 217], which is identical with the grant to the Southern Pacific and Atlantic and Pacific Railroads of July 27, 1866 [14 Stat. at L. 292]:

1. That the act did not provide for a withdrawal or reservation of indemnity lands;

2. That the Secretary of the Interior was not authorized to reserve the indemnity lands from homestead and pre-emption entries;

3. That patents issued to settlers, under the homestead and pre-emption laws, within such indemnity limits, based upon entries made prior to a selection by the railroad company, approved by the Interior Department, were valid, as conveyances of the land against the railroad title.

See:

Hewitt v. Schultz, 180 U. S. 139;
Moore v. Cormode, 180 U. S. 167;
Powers v. Slaght, 180 U. S. 173;
Moore v. Stone, 180 U. S. 180.

These recent and carefully considered decisions of the court upon these vital questions, which fully control the issues in the present suit, render it unnecessary to further argue them, as the contentions now made were there fully presented and denied by the court.

As the government had the right and power to patent the tract of land in suit to the defendant, *under either the homestead or pre-emption law*, it must be presumed, nothing appearing to the contrary, that the patent to Bell was upon either a homestead or pre-emption entry, for every intendment and presumption is in favor of the patent.

See cases cited at pages 20 and 21 of the brief for defendant in error.

JOSEPH H. CALL,
Counsel for Defendant in Error.

Supreme Court of the United States.

No. 20.—October Term, 1901.

The Southern Pacific Railroad Company, Plaintiff in Error, vs. Isaac T. Bell. } In error to the Supreme Court of the State of California.

[January 13, 1902.]

This was a complaint in the nature of a bill in equity filed by the Southern Pacific Railroad Company in the Superior Court of Fresno County, California, against Isaac T. Bell, praying to be declared the rightful owner of a certain quarter section of land in that county, and that it be adjudged that the defendant Bell holds the legal title to said land in trust for the plaintiff, and requiring him to convey the same to it free of all encumbrances.

The facts of the case, as set forth in the complaint, are substantially as follows: By "An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific Coast," (14 Stat. 492,) such road being incorporated under the name of The Atlantic and Pacific Railroad Company, there was granted to such railroad company—

"Sec. 3. . . . Every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption, or claims or rights, at the time the line of said road is designated by a plat thereof, filed in the office of the Commissioner of the General Land Office; and whenever prior to said time any of said sections or parts of sections shall have been granted, sold, reserved or occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections," &c.

"Sec. 6. And be it further enacted, That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road after the general route shall be fixed,

and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale or entry or pre-emption, before or after they are surveyed, except by said company, as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting pre-emption rights, and the acts amendatory thereof, and the Act entitled 'an act to secure homesteads to actual settlers on the public domain,' approved May twenty, eighteen hundred and sixty-two, shall be, and the same are hereby, extended to all other lands on the line of said road when surveyed, excepting those hereby granted to said company."

By section 18 of the same act authority was given to the Southern Pacific Railroad Company, incorporated under the laws of California, "to connect with the said Atlantic and Pacific Railroad, formed under this act, at such point near the boundary line of the State of California, as they shall deem most suitable for a railroad line to San Francisco, and shall have a uniform gauge and rate of fare with said road; and in consideration thereof, to aid in its construction, shall have similar grants of land, subject to all the conditions and limitations herein provided, and shall be required to construct its road on like regulations, as to time and manner, with the Atlantic and Pacific Railroad herein provided for."

On November 26, 1866, the plaintiff accepted the terms and conditions of the charter and grant of July 27, 1866, as above set forth, and on January 3, 1867, duly fixed the general route of its line of road, designating the same by a plat thereof filed in the office of the Commissioner of the General Land Office. This plat and designation having been duly approved and accepted by the Commissioner and Secretary of the Interior on March 22, 1867, all the odd-numbered sections of land lying within thirty miles of the railroad, as shown upon the plat, were withdrawn from sale or location, pre-emption or homestead entry, and have ever since remained so withdrawn.

Thereafter, and prior to November 8, 1889, the company duly constructed and equipped the entire railroad provided for in said act, and along the line designated upon the plat filed on January 3, 1867, and the road so constructed, except that part which extends from Mojave to the Needles, was duly accepted and approved by the President and Secretary of the Interior.

A certain quarter section of land within the granted limits of the railroad, as constructed and shown on the map, having been granted and otherwise disposed of, prior to the time when the line of

the route was designated by the plat filed with the Commissioner of the General Land Office, the quarter section of land in dispute in this case, which was within the indemnity, but not within the granted limits of the road, being more than twenty but within thirty miles on one side of the road as constructed, was selected by the railroad, in lieu of the quarter section above described as having been granted and otherwise disposed of by the United States. The land so selected was at the time the act of July 27, 1866, was passed, vacant and unappropriated public land of the United States, not mineral, to which the United States then had full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claims or rights, and such land has ever since so remained, except as it has been affected by the acts of the parties to this suit. The company had not, at the time the selection was made, nor has it since, selected or received lands to the extent or amount earned and acquired by it in virtue of the grant and the provisions of the granted act.

The complaint further alleged that notwithstanding the rights of the company secured to it by the act of July 27, 1866, the United States issued a patent for the quarter section so selected in lieu of the other, to the defendant, who claims the legal title to said land in fee simple and free from any trust or obligation to the plaintiff.

To this complaint the defendant interposed a general demurrer, which was sustained, and the plaintiff having refused to amend his complaint, a final judgment was entered against it and an appeal taken to the Supreme Court of California, where the judgment of the Superior Court of Fresno County was affirmed upon the authority of another case against one Wood. (124 Cal. 475.) Whereupon plaintiff sued out a writ of error from this court.

Mr. Justice Brown delivered the opinion of the Court.

This case involves a priority of right as to certain lands within the indemnity limits of the grant to plaintiff by act of Congress of July 27, 1866, and a patent for the same lands issued to the defendant as a settler under the land laws of the United States.

It presents the single question whether the railroad company had a right, on July 26, 1893, to select the land in dispute as lieu lands, notwithstanding the defendant had nearly one year before and on September 15, 1892, received a patent for the

same. This involves the further question whether the lands in dispute were subject to pre-emption and sale after the filing of the plat designating the line of the road; and this turns upon the meaning of the words, "land hereby granted," used in section 6, wherein it is enacted that the "odd sections of land *hereby granted* shall *not* be liable to sale or entry or pre-emption, before or after they are surveyed, except by said company, as provided in this act," which language must also be construed in connection with the further proviso in the same section, that the pre-emption act of 1841, the homestead act of 1862, and the acts amendatory thereof, "shall be and the same are hereby extended to all *other* lands on the line of said road when surveyed, excepting those *hereby granted* to said company."

There is no dispute that the land "hereby granted" extends to all the odd-numbered sections within the place limits; that is, within twenty miles of each side of the road. The real question is whether it extends to the indemnity lands, ten miles beyond this limit, so much of which the company was authorized to select in lieu of lands unavailable to it within the granted limits.

The relative rights of railroads and of settlers under these Congressional grants, all of which are couched in similar language, have been the subject of much litigation in this court, the main object of which has been to fix the time when the right of the roads to particular lands within both the place limits and the indemnity limits finally attaches as against both prior and subsequent settlers. Although at the last term of this court the question involved in the case under consideration was practically settled in *Hewitt* v. *Schultz*, (180 U. S. 139,) the progressive steps by which the conclusion in that case was reached will show the difficulties which have attended the solution of these questions, and, as we think, indicate the logical necessity of affirming this case. Two objects have been kept steadily in view: First, securing to the railroad the benefit of the lands actually granted; second, protecting, as far as possible, the right of the public to lands not actually granted, or necessary to indemnify the roads for lands which have become unavailable to it within its granted limits, by reason of the fact that they had been otherwise disposed of prior to the designation of the line of the road.

In the first of these cases, *Schulenberg* v. *Harriman*, (21 Wall. 44,) it was held that the act of June 3, 1856, granting lands to the

State of Wisconsin, to aid in the construction of railroads, was a grant *in præsenti* of lands within the granted limits, and passed the title to the odd sections designated to be afterwards located; but, until such designation, the title did not attach to any specific tracts, and that when the route was fixed the title which was previously imperfect acquired precision, and became attached to the lands as of the date of the grant. There was no question of indemnity lands involved.

In *Leavenworth &c. R. R. Co.* v. *United States*, (92 U. S. 733,) it was held that a similar grant, though operating *in præsenti*, did not apply to lands set apart for the use of an Indian tribe under a treaty, and that it was immaterial that they subsequently became a part of the public lands by the extinguishment of the Indian rights. This doctrine was extended in the next case, *Newhall* v. *Sanger*, (92 U. S. 761,) to lands within the boundaries of an alleged Mexican or Spanish grant, which was *sub judice* at the time the Secretary of the Interior ordered a withdrawal of lands along the route of the road.

In *Ryan* v. *Railroad Company*, (99 U. S. 382,) the rule laid down in the last two cases was qualified and limited to lands within the place limits, and it was held that, as the lands in *Ryan* v. *Railroad Company* were within the indemnity, but not within the place limits, "the railroad company had not and could not have any claim to it until specially selected." The land in dispute was within a tract formerly covered by a Mexican claim, which, although *sub judice* at the date of the act, had been finally rejected as invalid before the railroad company had selected it as part of its lieu lands. When so selected "there was no Mexican or other claim impending over it." This case practically holds that the title to indemnity lands inures to the railroad company only when selection is made.

This view, that the act conferred no rights to specified tracts within the indemnity limits until the grantees' right of selection had been exercised, was subsequently confirmed in *Cedar Rapids &c. R. R. Co.* v. *Herring*, (110 U. S. 27,) and *Kansas Pacific* v. *Atchison Railroad*, (112 U. S. 414,) although it had been stated only as a suggestion in *Grinnell* v. *Railroad Company*, (103 U. S. 739.)

In *Van Wyck* v. *Knevals*, (106 U. S. 360,) it was again held that the grant of the place lands was *in præsenti*, and attached to the

sections as soon as a map showing the definite location of the road was filed, and that a party who had subsequently entered a portion of the land covered by the grant, and procured a patent for the same, might be required to execute a release of the premises to the company. It was said by Mr. Justice Field, in that case, (p. 365,) that the grant cut off all subsequent claims from the date of this act, with certain exceptions specifically named, and passed the title as fully as if they had been then capable of identification.

The principle of this case was still further applied in *St. Paul Railroad* v. *Winona Railroad*, (112 U. S. 720,) to two conflicting grants, and it was held that as the title to the lands was within the place limits, it related back, after the road was located, to the date of the grant, priority of date of the act of Congress, and not priority of location of the line of the road, giving priority of title. A distinction was drawn in this case between the land within the place limits and land within the indemnity limits, and it was said that in case of the latter neither priority of grant, nor priority of location, nor priority of construction gave priority of right; but this was determined by priority of selection.

The case of *Buttz* v. *Northern Pacific Railroad*, (119 U. S. 55,) is in seeming conflict with *Leavenworth Railroad Co.* v. *United States*, (92 U. S. 733,) inasmuch as it was held that the grant by act of July 2, 1864, to the Northern Pacific Railroad, of lands to which the Indian title had not been extinguished, operated to convey the fee to the company subject to the right of occupancy by the Indians; but the case is distinguishable, as there was in the second section of the act a proviso that the United States "should extinguish, as rapidly as might be consistent with public policy and the welfare of the Indians, their title to all lands falling under the operation of this act, and acquired in the donation to the road." The prior case was not cited in the opinion.

The conclusions to be deduced from these cases are—

(1) That as to lands within the primary limits, the grant takes immediate effect, and attaches to particular lands when the map of definite location is filed; that the Secretary of the Interior may, upon the filing of such map, give notice of a withdrawal from sale of all the odd-numbered sections within the granted limits, and that the title so acquired by the railroad company relates back to the date of the grant and takes precedence of all titles subsequently acquired, except those specifically named.

(2) That to lands within the indemnity limits, the company takes no title until a deficiency in the place limits has been ascertained and the company has exercised its right of selection, with perhaps some rare exceptions. See *St. Paul & Pacific* v. *Northern Pacific*, (139 U. S. 1.)

The last case upon this subject is *Hewitt* v. *Schultz*, (180 U. S. 139,) which involved the title to a quarter section of land in North Dakota within the indemnity limits, that is (as applied to Territories), between the forty and fifty-mile limits of the Northern Pacific Railroad land grant. Plaintiff Hewitt claimed title as a settler under the pre-emption laws; defendant as a purchaser from the railroad company, under its grant of July 2, 1864. (13 Stat. 365.) The third and sixth sections of this act were, except as to the name of the railroad and a few immaterial words, identical with the corresponding sections of the Atlantic and Pacific act of July, 1866.

On March 30, 1872, the railroad company filed a map of its general route through the Territory of Dakota, and the local land office was thereupon directed to withhold from sale or location all the odd-numbered sections within the place limits of *forty* miles, as designated on such map. On June 11, 1873, the company having filed a map of the definite location of its line, the local land office was directed to withhold from sale, or entry, all the odd-numbered sections within the *fifty*-mile limits. This action was taken pursuant to the practice at that time prevailing in the General Land Office.

The land in dispute was more than forty, but within fifty, miles of the line of definite location; that is, was within the indemnity limits, and the controlling question in the case was whether it was competent for the Secretary of the Interior to withdraw the odd-numbered sections within such indemnity limits; that is, between the forty and fifty-mile limits.

Hewitt settled upon the land April 10, 1882, more than a year before the withdrawal was made, and it was not until March 19, 1883, that the railroad company filed in the local land office its selection of land, embracing the land in dispute within the indemnity limits.

On April 4, 1883, Hewitt submitted his final proofs for the land, tendered the price, and demanded a patent; but his proof was rejected on the ground that the land had been withdrawn

from entry under the act of July 2, 1864. Hewitt appealed to the Commissioner of the General Land Office, who affirmed the decision of the local land office, October 5, 1883. He was ousted of his possession the following year by the defendant Schultz, who had taken a deed from the railroad company. On August 15, 1887, the order of withdrawal of the indemnity lands was revoked, and upon a review by the Commissioner of the General Land Office of his former decision, the ruling of the local land office was set aside, Hewitt's final proofs admitted, and the selection by the railroad held for cancellation. The company appealed from the decision in favor of Hewitt to the Secretary of the Interior, who affirmed the decision of the Commissioner, and a patent was issued to Hewitt, June 22, 1895.

It was contended upon the argument in this court that the words "the odd sections of land *hereby granted*," used in the sixth section, referred to the lands described in the "first" (third) section of the act; that is, to those within the place limits, which were free from pre-emption and other claims, and unappropriated prior to the definite location of the road; and that, as to "all other lands on the line of said road, when surveyed," the act expressly declared that the pre-emption and homestead acts should extend to them; "that Congress took pains to declare that it did not exclude from the operation of those statutes any lands except those granted to the company in the place limits of the road which were unappropriated when the line of the railroad was definitely fixed; and that if at the time such line was 'definitely fixed,' it appeared that any of the lands granted, that is, lands in the place limits, had been sold, granted or otherwise appropriated, then, but not before, the company was entitled to go into the indemnity limits beyond the forty-mile and within the fifty-mile line, and under the direction of the Secretary of the Interior, and not otherwise, select odd-numbered sections to the extent necessary to supply the loss in the place limits."

The court, treating the question as one of grave doubt, based its views largely upon the practice of the Land Office since 1888, and of the opinions of Secretary Lamar in the *Atlantic & Pacific Railroad*, (6 Land Dec. 84,) and of Secretary Vilas in *Northern Pacific Railroad* v. *Miller*, (7 Land Dec. 100.) The opinion of Secretary Lamar indicated that some of his predecessors had assumed that the power to withdraw lands within the indemnity

limits could be exercised upon a definite location of the railroad before the loss in the place limits had been ascertained, but treating it as an original proposition, he thought the words of the act, "that the odd-numbered sections of land *hereby granted* shall not be liable to sale, or entry, or pre-emption," indicated clearly the legislative will that none other should be withdrawn than the odd-numbered sections within the *granted* limits. Mr. Secretary Vilas, considering the same subject, said: "In my opinion, and it is with great deference that I present it, the granting act not only did not authorize a withdrawal of lands in the indemnity limits, but forbade it. The difference between lands in the granted limits and land in indemnity limits, and between the time and manner in which the title of the United States changes to and vests in the grantee, accordingly as lands are within one or the other of these limits, has been clearly defined by the Supreme Court, and it is sufficient to state the well-settled rules upon this subject."

The same question arose in *Northern Pacific Railroad* v. *Davis*, (19 Land Dec. 87,) and in *Northern Pacific Railroad* v. *Ayers*, wherein Secretaries Smith and Francis expressed their concurrence in the views announced by Secretaries Lamar and Vilas.

The court rested its decision largely upon this concurrence of views and long continued practice of the Land Department, and summed up its opinion in the following words: "If this were done," (that construction overthrown,) "it is to be apprehended that great if not endless confusion would ensue in the administration of the public lands, and that the rights of a vast number of people who have acquired under the pre-emption and homestead laws, in reliance upon the ruling of Secretary Vilas and his successors in office, would be destroyed. . . . If the practice in the Land Department could, with reason, be held to be wrong, it cannot be said to have been so plainly or palpably wrong as to justify the court, after the lapse of so many years, in adjudging that it had misconstrued the act of July 2, 1864."

It is attempted to distinguish the case under consideration from that of *Hewitt* v. *Schultz*, by the fact that the land in controversy in this case is within the indemnity limits of a grant to a railroad passing through a *State*, and within the department's withdrawal of a thirty-mile strip under the sixth section of the act, while the land in the Hewitt case fell within the indemnity limits of the grant within a *territory*, and was beyond the forty-mile with-

drawal, and was not withdrawn from sale by the sixth section, but was expressly declared to be still subject to the operations of the pre-emption laws. It is true that the lands withdrawn in that case lay within a Territory and outside of the forty-mile strip required to be surveyed, while in this case the withdrawal of all the lands within the thirty-mile strip operates as a withdrawal of all lands within the indemnity, as well as within the place limits, because the line ran through a State instead of a Territory. But the real question is not whether the indemnity lands lay within or beyond the forty-mile limit, but whether the withdrawal can operate upon indemnity lands at all. It makes no difference in principle whether the indemnity lands are within or beyond the forty-mile limit, which is not a limit of withdrawal but of *survey*, and the whole argument in *Hewitt* v. *Schultz* is directed to the question whether it is within the power of a Secretary of the Interior to withdraw indemnity as well as place lands from settlement. The quantity of lands to be surveyed seems to have been arbitrarily fixed by Congress, with little attention to the actual limits of the grant, so as to include all lands within forty miles of each side of the railroads, that is, ten miles beyond the indemnity limits within the States, but ten miles inside of those limits within the Territories; but the question of withdrawal is not necessarily dependent upon the question of survey, and the fact that in that case the indemnity lands were beyond the forty-mile limit was an incident rather than a dominant fact. As said by Mr. Secretary Lamar: "It is manifest that the said act gave no especial authority or direction to the executive to withdraw said lands, and when such withdrawal was made it was done by virtue of the general authority over such matters possessed by the Secretary of the Interior and in the exercise of his discretion." The power of the Secretary to withdraw lands is exercised for the purpose of carrying out the grant to the railroad, and to prevent lands covered by said grant from being taken up by settlers before the road is completed and the patents issued to the company; but clearly that power cannot be exercised to withdraw lands which are beyond the intended limits of the grant. It was said by Secretary Smith to have been exercised for many years, "but the right of this asserted power on the part of the executive is involved in obscurity." (*Northern Pacific R. R.* v. *Davis*, 19 Land Dec. 87, 88.)

That the object of section six was to direct a survey and not a withdrawal of lands within the forty-mile strip, seems to have been the opinion of this court in *St. Paul Railroad* v. *Winona Railroad*, (112 U. S. 720,) in which Mr. Justice Miller, delivering the opinion (says, p. 732:)

"The plaintiff in error insists that the map of its line of road was filed in 1859. The court of original jurisdiction finds that, up to the time of the trial in October, 1878, a period of nearly twenty years, no selection of these lands had ever been made by that company, or any one for it. Was there a vested right in this company, during all this time, to have not only these lands, but all the other odd sections within the twenty-mile limits on each side of the line of the road, await its pleasure? Had the settlers in that populous region no right to buy of the government because the company might choose to take them, or might, after all this delay, find out that they were necessary to make up deficiencies in other quarters? How long were such lands to be withheld from market and withdrawn from taxation, and forbidden to cultivation?

"It is true that in some cases the statute requires the Land Department to withdraw the lands within these secondary limits from the market, and in others the officers do so voluntarily. This, however, is to give the company a reasonable time to ascertain their deficiencies and make their selections.

"It by no means implies a vested right in said company, inconsistent with the right of the government to sell, or of any other company to select, which has the same right of selection within those limits. Each company having this right of selection in such case, and having no other right, is bound to exercise that right with reasonable diligence; and when it is exercised in accordance with the statute, it becomes entitled to the lands so selected."

If the command of the statute were to withdraw from the market, instead of survey, all odd-numbered sections within the forty-mile strip, the position of the railroad company in this case would be impregnable; but as the withdrawal only extends to the lands "hereby granted," we must look elsewhere to ascertain the meaning of those precise words. There is good reason for withdrawing lands within the place limits, since these lands already belong to the railroad company, as soon as they are identified by the location of the line, while lands within the indemnity limits may never be required at all, and in most cases are required only to a limited extent. Undoubtedly the company acquires title to both classes of lands by the third section of the

granting act; but it acquires a title to lands within the place limits by a present grant; but to land within the indemnity limits, only by a future power of selection. In both cases the statute is the origin of the title; but in the one case it gives instantaneously; in the other it is a mere promise to give in the future, and requires the action of the railroad to perfect it. The words "hereby granted" evidently refer to the former.

Treating this case as a reargument of the question involved in *Hewitt* v. *Schultz*, and it practically comes to that, we still adhere to the principle there announced. It seems to us the more reasonable, if not the necessary, inference to be deduced from the language of sections 3 and 6. By the former there is "*hereby granted* . . . every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State." These words terminate the grant, the remainder of the clause being immaterial in this connection, and if the whole clause had been followed by a period, instead of a semicolon, the meaning, perhaps, would have been clearer. But there follows another clause, that "whenever, prior to said time, any of said sections, or parts of sections, shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be *selected* by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections," &c. There is here a clear distinction between the lands *granted in præsenti* in the first clause, and lands to be thereafter *selected* by the company, whenever the deficiency in the granted lands shall be ascertained.

The sixth section carries out the same idea. It requires a survey of forty miles in width on both sides of the entire line, whether passing through States or Territories. This would include only the granted or place limits within a Territory, but within a State would cover the indemnity limits as well. There was no order in the act to withdraw any lands from settlement or sale, but such withdrawal seems to have been made in pursuance of the practice of the Interior Department, and for the pur-

pose of preventing lands granted to the railroad company from being taken up by settlers, before the completion of the line and the final issue of patents. As was said by Mr. Secretary Lamar in the *Atlantic & Pacific Railroad Company*, (6 Land Dec. 84,) "Waiving all questions as to whether or not said granting act took from the Secretary all authority to withdraw said indemnity limits from settlement, it is manifest that the said act gave no special authority or direction to the executive to withdraw said lands; and when such withdrawal was made it was made by virtue of the general authority over such matters possessed by the Secretary of the Interior, and in the exercise of his discretion; so that, were the withdrawal to be revoked, no law would be violated, no contract broken." But as the power to withdraw extends only to the "*lands hereby granted*" and all other lands, except those hereby granted, remain open to settlement, we are thrown back upon section 3 to determine what are the lands "hereby granted."

Now, as already observed, there is a clear distinction in section 3 between granted lands and lands to be selected after the deficiency in the granted lands has been ascertained. It is true that, prior to this selection being made, many of these indemnity lands may be taken up, and an insufficient amount left for the railroad, (and we do not deny the force of the dissenting opinion in *Hewitt* v. *Schultz* in that connection,) but we think this possibility serves rather as a basis for a further action by Congress, such as was made in the Northern Pacific case by the joint resolution of May 31, 1870, (16 Stat. 378,) than as a reason for withdrawing from settlement a vast amount of land which the railroad may never have occasion to require. It was said by Secretary Lamar in the case of the *Atlantic & Pacific Railroad Co.* (6 Land Dec. 84, 87): "As to the lands within the indemnity limits, the contract was based upon two contingencies; that of losing lands within the granted limits, and being able to find sufficient to indemnify the company among the odd-numbered sections within a further limit of ten miles. Here the interest of the company was so remote and contingent, being a mere potentiality, and not a grant, that Congress declined to order a withdrawal for the benefit of the same, or even a survey within the Territories." In view of the constant trend of population toward the Western Territories, it is a serious matter to withdraw these enormous tracts from settlement and hold them, as it were, in

mortmain against the protest of those who stand ready to enter upon and possess them.

It becomes still more serious when, as in this case, there was a delay of twenty-seven years between the granting act and the act of selection. It seems intolerable that a settler, who had entered and paid for lands in good faith, should be liable to an ouster after a possible lapse of twenty-seven years, when the very improvements he may have put upon the lands might be the reason for their selection by the company.

We are therefore of opinion that the act of July 27, 1866 did not authorize the withdrawal by the Secretary of the Interior of the indemnity lands; that such lands remained open to homestead and pre-emption entry, and that patents issued to settlers within such indemnity limits, based upon the entries made prior to the selection by the railroad company, approved by the Interior Department, were valid as conveyances of the land as against the selection by the railroad company.

The judgment of the Supreme Court of California is, therefore,

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.